(2)

Supreme Court, U.S.
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No. 03-9046

In The Supreme Court of the United States

CHARLES RUSSELL RHINES,

Petitioner,

v.

DOUGLAS WEBER, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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ORDER	DOCUMENT	DATE FILED
1.	Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus (with attached state court Judgment including sentence)	02/22/00
2.	Procedural Order	04/05/00
3.	Motion to Toll Time	05/15/00
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5.	Order (on Motion to Toll Time)	06/29/00
6.	Amended Procedural Order	10/18/00
7.	First Amended Petition For Writ of Habeas Corpus and Statement of Exhaustion	11/20/00
8.	State's Response to Procedural Order and Motion to Dismiss	01/22/01
9.	Second Amended Procedural Order	02/20/01
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PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

(Filed Feb. 22, 2000)

United States District Court	District SOUTH DAKOTA, SOUTHERN DIVISION	
Name CHARLES RUSSELL RHINES	Prisoner No. 28414	Case No. CIV-00-4032
Place of Confinement SOUTH DAKOTA STATE PENITENTIARY SIOUX FALLS, MINNEHAHA COUNTY SOUTH DAKOTA		
Name of Petitioner (include name under which convicted) CHARLES RUSSELL RHINES	Name of Respondent (authorized person having custody of petitioner V. DOUGLAS WEBER WARDEN: SOUTH DAKOTA STATE PENITENTIARY	
The Attorney General of the State of: SOUTH DAKOTA: MARK BARNETT		

PETITION

1. Name and location of court which entered the judgment of conviction under attack SEVENTH JUDICIAL CIRCUIT COURT, RAPID CITY, PENNINGTON COUNTY, SOUTH DAKOTA
2. Date of judgment of conviction JANUARY 2 , 1 3
3. Length of sentence DEATH AND TEN YEARS
4. Nature of offense involved (all counts) FIRST DEGREE MURDER AND THIRD DEGREE BURGLARY

5. What was your plea? (Check one)
   (a) Not Guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details:

---

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☒
   (b) Judge only ☐

7. Did you testify at the trial?
   Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

9. If you did appeal, answer the following:

   (a) Name of court SOUTH DAKOTA SUPREME COURT

   (b) Result CONVICTION AND SENTENCE AFFIRMED

   (c) Date of result and citation, if known MAY 16, 1996: STATE V. RHINES: 1996 SD 55; 548 N.W. 2D 415

   (d) Grounds raised PLEASE SEE ATTACHED SHEET #1

   (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

      (1) Name of court NO HIGHER STATE COURT AVAILABLE FOR REVIEW

      (2) Result _____

      (3) Date of result and citation, if known _____

      (4) Grounds raised _____

   (f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

      (1) Name of court UNITED STATES SUPREME COURT

      (2) Result DENIAL OF CERTIORARI

      (3) Date of result and citation, if known DECEMBER 1996 CITATION UNKNOWN

      (4) Grounds raised EIGHTH AMENDMENT VIOLATIONS IN THREE PARTICULARS

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
    Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

   (a) (1) Name of court SEVENTH JUDICIAL CIRCUIT COURT

      (2) Nature of proceeding SOUTH DAKOTA HABEAS CORPUS

      (3) Grounds raised PLEASE SEE ATTACHMENT #2

      (4) Did you receive an evidentiary hearing on your petition, application or motion?
      Yes ☒ No ☐

      (5) Result DENIAL OF WRIT

      (6) Date of result OCTOBER 1998 (APPEALED TO SD S.CT.: DENIED FEB 2000)

   (b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes ☒ No ☐
(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting the same.

Caution: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date:

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise all grounds which you may have other than those listed if you have exhausted you [sic] state

court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(h) Denial of right of appeal

A. Ground one: DENIAL OF FAIR AND IMPARTIAL HEARING UNDER SIXTH AMENDMENT TO US CONSTITUTION

Supporting FACTS (state *briefly* without citing cases or law) ON OCTOBER 18, 1995 A LOCAL TELEVISION STATION AIRED A NEWS PROGRAM FEATURING A SD S.CT. JUSTICE ATTENDING/PARTICIPATING IN APPEAL OF CONVICTION/SENTENCE. THIS S.CT. JUSTICE WAS APPOINTED TO COURT SUBSEQUENT TO APPELLANT'S TRIAL AND HAD PRESIDED OVER APPELLANT'S TRIAL. SD S.CT. JUSTICE JOHN K. KONENKAMP APPARENTLY PARTICIPATED IN THE APPEAL PROCESS OF A CASE HE PRESIDED OVER AS A TRIAL COURT JUDGE.

B. Ground two: DENIAL OF FAIR AND IMPARTIAL TRIAL CONTRARY TO THE SIXTH AMENDMENT TO THE US CONSTITUTION

Supporting FACTS (state *briefly* without citing cases or law) DURING VOIR DIRE, PROSECUTION EXCLUDED VENIREPERSON DIANNE STAEFFLER BECAUSE SHE HAD RESERVATIONS ABOUT THE DEATH PENALTY. COURT EXCLUDED VENIREPERSON FOR HER VIEWS ON CAPITAL PUNISHMENT, EVEN THOUGH VENIREPERSON HAD STATED SI OULD [sic] COULD CONSIDER THE DEATH PENALTY AS A POSSIBLE PUNISHMENT.

C. Ground three: DENIAL OF FAIR AND IMPARTIAL TRIAL. SIXTH AMENDMENT TO THE US CONSTITUTION.

Supporting FACTS (state *briefly* without citing cases or law) WITNESS GLEN WISHARD COMMITTED PERJURY TESTIFYING TO APPELLANT'S "STATE OF MIND" SEVERAL HOURS AFTER

COMMISSION OF OFFENSE. PROSECUTOR KNEW WITNESS WISHARD WAS TESTIFYING FALSELY AND DID NOTHING TO CORRECT TESTIMONY.

D. Ground four: denial of sixth amendment, denial of effective assistance OF COUNSEL.

Supporting FACTS (state *briefly* without citing cases or law) APPELLANT WAS APPOINTED THREE (3) ATTORNEY'S [sic] TO REPRESENT HIM AT TRIAL. ATTORNEY #1 – WAYNE F. GILE HAS SUBSEQUENTLY BEEN DISBARRED FOR ILLEGAL ACTIVITIES PRIOR TO AND DURING PERIOD OF REPRESENTATION. #2 – WAS PRIMARILY A CIVIL LITIGATOR WITH LIMITED CRIMINAL TRIAL EXPERIENCE. #3 – WAS OVER-WORKED PUBLIC DEFENDER WHO HAD TO SHOULDER MOST OF WORK LOAD – IN ADDITION TO BEING APPOINTED AS APPELLANT'S "INVESTIGATOR."

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: I ATTEMPTED TO HAVE PREVIOUS ATTORNEY, MICHAEL W. HANSON, PRESENT GROUND 1 BUT HE DID NOT INVESTIGATE THE LEADS I GAVE HIM. APPARENTLY HE BELIEVED IT WOULD BE TO NO AVAIL TO ATTACK SD S.CT. ON IT'S [sic] OWN GROUND, SO TO SPEAK. I CONCUR.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of judgment attached herein:

(a) At preliminary hearing NO PRELIMINARY HEARING: GRAND JURY INDICTMENT

(b) At arraignment and plea 1) WAYNE F. GILBERT, CURRENT ADDRESS UNKNOWN. 2) JOSEPH M. BUTLER, 818 ST. JOSEPH ST. RAPID CITY, SD. 3) MICHAEL STONEFIELD, PENNINGTON COUNTY PUBLIC DEFENDERS OFFICE, RAPID CITY, SD field: PENNINGTON COUNTY PUBLIC DEFENDERS OFFICE, RAPID CITY, SD 57701

(c) at trial SAME AS (b)

(d) At sentencing SAME AS (b)

(e) On appeal WAYNE F. GILBERT & MICHAEL STONEFIELD

(f) In any post-conviction proceeding MICHAEL W. HANSON, 505 W. 9th St. Sioux Falls, SD

(g) On appeal from any adverse ruling in a post-conviction proceeding Same as in (f)

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and the same time?
Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

_____
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

FEBRUARY 17, 2000
(date)

/s/ Charles Rhines
Signature of Petitioner
CHARLES R. RHINES, PRO SE

GROUND FIVE: SIXTH AMENDMENT TO THE US CONSTITUTION. DENIAL OF FAIR AND IMPARTIAL JURY.

SUPPORTING FACTS: SOUTH DAKOTA CAPITAL PUNISHMENT JURIES ARE SELECTED TO SEAT A TRIBUNAL ORGANIZED TO RETURN A VERDICT OF GUILTY IN THE GUILT PHASE OF CAPITAL TRIALS AND DEATH IN THE PENALTY PHASE THROUGH "DEATH QUALIFICATION." THIS CAPITAL TRIAL/ SENTENCING JURY WAS ORGANIZED TO RETURN THE VERDICTS REQUESTED BY THE PROSECUTION BY WEEDING OUT ALL VENIREPERSONS FROM THE JURY POOL WHO HAD THE SLIGHTEST HESITANCY CONCERNING THE USE OF THE DEATH PENALTY.

ATTACHMENT #1

GROUNDS RAISED ON DIRECT APPEAL.

1) TRIAL COURT ERRED BY NOT SUPPRESSING STATEMENTS

2) TRIAL COURT ERRED IN EXCUSING VERNIREPERSON FOR CAUSE.

3) CALCULATED AND SELECTIVE USE OF PEREMPTORY CHALLENGES CREATED A JURY DEVOID OF THOSE WITH OPPOSITION TO CAPITAL PUNISHMENT.

4) CONSTITUTIONALLITY [sic] OF SOUTH DAKOTA CAPITAL PUNISHMENT STATUTE.

5) TRIAL COURT ERRED BY ALLOWING VICTIM IMPACT TESTIMONY

6) EVIDENCE WAS INSUFFICIENT TO SUSTAIN VERDICT OF TORTURE UNDER AGGRAVATING CIRCUMSTANCE § 23A-27A-1(6).

7) TRIAL COURT ERRED IN IT'S [sic] INSTRUCTIONS REGARDING AGGRAVATING CIRCUMSTANCE § 23A-27A-1(6).

8) TRIAL COURT ERRED IN IT'S [sic] INSTRUCTIONS REGARDING CIRCUMSTANCE 23A-27A-1(3).

9) THE JURY'S CONSIDERATION OF ONE OR MORE INVALID AGGRAVATING CIRCUMSTANCES REQURIES REVERSAL OF THE DEATH SENTENCE.

10) TRIAL COURT ERRED BY ALLOWING INTO EVIDENCE STATEMENTS MADE BY APPELLANT CONCERNING THE JUSTICE SYSTEM.

11) TRIAL COURT ERRED IN REFUSING TO APPOINT A FORENSIC COMMUNICATION EXPERT.

12) TRIAL COURT ERRED BY REFUSING SEVERAL OF APPELLANT'S JURY INSTRUCTIONS.

13) APPELLANT'S DEATH SENTENCE WAS IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE OR OTHER ARBITRARY FACTORS.

14) THIS COURT (SD S.Ct.) SHOULD [sic] IT"S STATUTORILY REQUIRED PROPORTIONALLITY [sic] REVIEW USING A BROAD POOL OF "SIMILAR CASES," AND SHOULD ALLOW PRESENTATION AT A LATER TIME OF FURTHER EVIDENCE ON PROPORTIONALLITY [sic].

ATTACHMENT #2

PAGE 1

GROUNDS RAISED ON SOUTH DAKOTA HABEAS CORPUS REVIEW.

1) THAT DURING TRIAL PREPARATION, TRIAL AND APPELLATE PHASES, APPELLANT HAD INEFFECTIVE ASSISTANCE OF COUNSEL.

2) THAT A CONSTITUTIONAL LAW VIOLATION OCCURRED WHEN TRIAL COURT REFUSED TO SUPPRESS APPELLANT'S STATEMENT'S [sic] OF JUNE 19 AND JUNE 21, 1992.

3) THAT THE TRIAL COURT VIOLATED DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN EXCUSING VENIREPERSON DIANE STAEFFLER.

4) CALCULATED AND SELECTIVE USE OF PEREMPTORY [sic] CHALLENGES CLEARED THE

ER-
JURY OF ANY VENIREPERSON WITH F
VATIONS ABOUT CAPITAL PUNISHMENT.

AN-
5) THAT THE TRIAL COURT'S REFUSAL T HE
SWER THE QUESTIONS SUBMITTED B IFE
JURY CONCERNING THE "REALITY OF S.
WITHOUT PAROLE" VIOLATED DUE PROC

ENT
6) THE SOUTH DAKOTA CAPITAL PUNISH ND
STATUTES VIOLATE DUE PROCESS
EQUAL PROTECTION OF THE LAW.

BY
7) APPELLANT WAS DENIED DUE PROCE ACT
THE TRIAL COURT ALLOWING VICTIM I
TESTIMONY.

AIN
8) EVIDENCE WAS INSUFFICIENT TO SU ING
VERDICT OF TORTURE UNDER AGGRAV IN
CIRCUMSTANCE 23A-27A-1(6) RESULTI
VIOLATION OF DUE PROCESS OF LAW.

UC-
9) TRIAL COURT ERRED IN IT'S [sic] INS UM-
TIONS REGARDING AGGRAVATING CI ND,
STANCE 23A-27A-1(6), DEPRAVITY OF ESS.
RESULTING IN A VIOLATION OF DUE PR

UC-
10) TRIAL COURT ERRED IN IT'S [sic] INS UM-
TIONS REGARDING AGGRAVATING CI A
STANCE 23A-27A-1(3), RESULTING
VIOLATION OF DUE PROCESS.

ORE
11) THE JURY'S CONSIDERATION OF ONE OR [sic]
INVALID AGGRAVATING CIRCUMSTANC RO-
VIOLATED DUE PROCESS AND EQUAI
TECTION OF THE LAW.

S IN
12) THE TRIAL COURT VIOLATED DUE PROC MU-
REFUSING TO APPOINT A FORENSIC C
NICATONS EXPERT.

13) TRIAL COURT VIOLATED DUE PROCESS BY REFUSING SEVERAL OF APPELLANT'S JURY INSTRUCTIONS.

14) THE DEATH SENTENCE WAS IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE OR OTHER ARBITRARY FACTORS SO AS TO CONSTITUTE A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

15) THE IMPOSITION OF A DEATH SENTENCE IN THIS CASE WAS DISPROPORTIONATE TO ALL OTHER HOMICIDE CASES IN SOUTH DAKOTA SO AS TO VIOLATE EQUAL PROTECTION OF THE LAW AND DUE PROCESS.

16) THE USE OF *STATE VS. MOELLER* BY THE STATE OF SOUTH DAKOTA, TO SHOW THAT THE DEATH SENTENCE WAS NOT DISPROPORTIONATE VIOLATED DUE PROCESS.

17) THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT WHEN HE ASKED THE MEDICAL EXAMINER IF THE VICTIM WAS TIED UP BEFORE OR AFTER DEATH, WHEN THE PROSECUTOR KNEW IN ADVANCE THE MEDICAL EXAMINER COULD NOT DETERMINE WHEN THE VICTIM WAS TIED UP, RESULTING IN A VIOLATION OF DUE PROCESS OF THE APPELLANT'S RIGHTS.

18) THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN VIOLATION OF THE APPELLANT'S DUE PROCESS RIGHTS BY NEVER COMING OUT AND SAYING HE WOULD INTRODUCE A VICTIM IMPACT STATEMENT UNTIL THE DAY OF THE PENALTY PHASE OF THE TRIAL STARTED.

19) THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS WHEN HE MADE REFERENCE TO THE APPELLANT "GUTTING." THE VICTIM, WHEN THE EVIDENCE CLEARLY SHOWED NO SUCH THING HAD OCCURRED.

20) THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS, BY INTRODUCING INTO EVIDENCE ENLARGED PHOTOGRAPHS OF THE VICTIM, IN WHICH THE STAB WOUNDS WERE DISPROPORTIONATELY ENLARGED TO REFLECT THE ALLEGED ATTEMPT TO "GUT" OR "DEGUT" THE VICTIM.

STATE OF SOUTH DAKOTA,)
) SS IN CIRCUIT COURT
COUNTY OF PENNINGTON,)

STATE OF SOUTH DAKOTA,)
Plaintiff,) SEVENTH JUDICIAL CIRCUIT
vs.)
CHARLES RUSSELL RHINES,) File No. 93-81
DOB: 7/11/56) JUDGMENT
PCN #: 1674495) (Filed Jan. 29, 1993)
Defendant.)

On the 29th day of January, 1993, at the hour of 9:00 o'clock a.m., the Defendant, CHARLES RUSSELL RHINES, being present personally and being represented by and through his attorneys, Joseph Butler, Wayne Gilbert, and Mike Stonefield, each of Rapid City; the State being represented by State's Attorney, Dennis A. Groff,

and Deputy State's Attorney, Mark A. Vargo; the Defendant having previously been arraigned on an indictment alleging the offense of COUNT I: FIRST DEGREE MURDER (FELONY), committed on or about March 8, 1992, in violation of SDCL 22-16-4; the Defendant having previously entered a plea of Not Guilty to COUNT I of the Indictment as charged; a jury trial having been held before this Court commencing the 4th day of January, 1993, with respect to said offense; the jury having returned its verdict of Guilty of the offense of COUNT I: FIRST DEGREE MURDER (FELONY) on January 22, 1993; a pre-sentence hearing having been held before the jury commencing on the 25th day of January, 1993; the jury having returned its unanimous verdict with a finding of three aggravating circumstances and a recommendation that the death sentence be imposed, and the Defendant having been fully advised of his rights, and the Court having affixed this day as the date for pronouncing sentence; the Defendant having been asked whether there was any legal cause to show why a judgment should not be pronounced against him in accordance with the law and no cause being shown; it is hereby

ORDERED AND ADJUDGED, and the judgment and sentence of this Court is that you, CHARLES RUSSELL RHINES, upon your conviction for the crime of FIRST DEGREE MURDER (FELONY), shall suffer the death penalty, said penalty to be inflicted within the walls of the South Dakota State Penitentiary in the manner prescribed by the statutes of the State of South Dakota, and it is further ORDERED, that the week of August 22, 1993, be and the same is hereby appointed as the week within which this death sentence shall be executed, and it is further

ORDERED, that the Defendant, CHARLES RUSSELL RHINES, is hereby remanded to the custody and control of the Sheriff of Bennington County, South Dakota, to be by him delivered to the Warden of the South Dakota State Penitentiary at Sioux Falls, South Dakota, within ten (10) days from the date hereof for the execution of the sentence for the offense of MURDER IN THE FIRST DEGREE, to be held by him pending the final determination of the appeals in this matter, which are automatic, and said sentence to be executed upon final determination of said appeals.

Dated this 29th day of January, 1993.

BY THE COURT:

/s/ John K. Konenkamp
The Honorable
John K. Konenkamp
Circuit Court Judge
Seventh Judicial Circuit

ATTEST:

/s/ Bonnie Fitzgerald
Clerk of Courts

By J Bock
Deputy

NOTICE OF RIGHT TO APPEAL

You, CHARLES RUSSELL RHINES, are hereby notified that pursuant to SDCL 23A-27A-9, that the Clerk of Courts of the Seventh Judicial Circuit, within ten (10) days after receiving the transcript of this trial, shall transmit the entire record and transcript of the Supreme Court together with a Notice prepared by the Clerk and a report prepared by the trial judge. The Notice shall set

forth the title and docket number of this case, your name and the names and addresses of your attorneys, a narrative statement of the Judgment, the offense, and the punishment prescribed.

You are further notified that you have a right to appeal as provided for by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of the State of South Dakota and the State's Attorney of Pennington County and by filing a copy of the same, together with proof of such service with the Clerk of this Court within Thirty (30) days from the date that this Judgment is filed with said Clerk.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES, Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	)	Civ. 00-5020-KES PROCEDURAL ORDER (Filed Apr. 5, 2000)

The court has appointed Michael Butler and John Schlimgen to represent petitioner in this matter. In order to get the progression of this case on track, it is hereby

ORDERED that the South Dakota Attorney General file a notice of appearance with the court within ten days from the entry of this order.

IT IS FURTHER ORDERED that the Clerk of the Court has petitioner's criminal and habeas files from the state court. The Clerk shall provide two copies to petitioner's counsel.

IT IS FURTHER ORDERED that counsel should make every effort to obtain a complete copy of the record on appeal and the files of petitioner's prior attorneys within thirty days of the date counsel is appointed. Although the court does not usually assist directly in obtaining the record, counsel should report any delays to the court so that the court is fully aware of any obstacles encountered.

IT IS FURTHER ORDERED that the following procedure will generally govern the briefing and resolution of this habeas corpus proceeding:

1. ***Status Conference*:** A status conference will be held on Friday, April 7, 2000, at 9 a.m. at the federal building in Sioux Falls, South Dakota. This status conference shall include only the court, petitioner, and petitioner's counsel. These parties should be prepared to discuss petitioner's pending discovery requests and the application for extraordinary writ. The parties should also be prepared to discuss any statute of limitations, exhaustion of state remedies, or other issues, if any, which may affect the filing of the Amended Petition or efficient resolution of this matter. The court will also address the procedure to be followed in this case which is outlined below.

2. ***Amended Petition*:** After the status conference is held, the court will enter a scheduling order to govern the filing of the Amended Petition in this case. Because petitioner commenced this proceeding after April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") applies to this case. *Lindh v. Murphy*, 117 S. Ct. 2059 (1997). Under 28 U.S.C. § 2244(d)(1), as amended by the AEDPA, an application for habeas corpus relief must be filed within one year "of the date on which the judgment became final by the conclusion of direct review."

The Amended Petition shall include all known claims of constitutional error or deprivation entitling petitioner to habeas relief. *See* Rule 2(c), 28 U.S.C. foll. § 2254. Petitioner is advised that he may be presumed to have deliberately waived his right to complain of any constitutional error or deprivation not raised in the Amended Petition.

See Rule 9(b), 28 U.S.C. foll. § 2254; *see also McCleskey v. Zant*, 499 U.S. 467, 498 (1991) (abuse of the writ doctrine bars review of claims that could have been raised in a previous habeas petition absent a showing of cause and prejudice or a fundamental miscarriage of justice). Petitioner is further advised that pursuant to 28 U.S.C. § 2244, he may not file a second or successive petition in this court without prior authorization from the Eighth Circuit. Under § 2244(b)(3)(C), the grounds for obtaining such authorization are extremely limited. Consequently, it is incumbent upon petitioner to raise all known claims in the Amended Petition.

The Amended Petition shall set forth, in a clear and concise fashion, the legal and factual basis for each ground for relief. The factual basis shall include full citations to the appropriate portions of the record. Additionally, petitioner shall include in the Amended Petition a "Statement of Exhaustion," specifically asserting when and where each ground for relief was raised in the state courts. *See Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998).

3. *Procedural Status of Claims*: Respondent shall file an Answer Re: Procedural Status of Claims, which addresses the procedural status of all claims raised in the Amended Petition, specifically identifying which claims, if any, respondent contends are unexhausted or procedurally barred from review on the merits. Petitioner shall respond to the answer by filing a traverse. The traverse shall be a comprehensive responsive pleading which addresses issues of exhaustion and procedural default, and shall present alternative arguments of cause and prejudice or a fundamental miscarriage of justice, when applicable. Requests for an evidentiary hearing

regarding cause and prejudice, or miscarriage of justice, shall be incorporated into petitioner's traverse. Respondent may file a reply, if he wishes. Finally, petitioner may file a sur-reply that shall be limited to arguments concerning cause and prejudice or a fundamental miscarriage of justice, should respondent address those issues in a reply. The court intends this briefing on the procedural status of the claims to be the sole briefing on all issues of exhaustion and procedural default necessary for the court to determine which claims will be reviewed on the merits.

4. *Merits of Claims*: After the procedural status of the claims raised in the Amended Petition is fully briefed, the court will determine which claims will be reviewed on the merits. A scheduling order will be issued that will set forth when petitioner shall file a Memorandum of Law Re: Merits of Claims, when respondent shall file a Response Re: Merits of Claims, and when Petitioner shall file a Reply. Requests for an evidentiary hearing shall be incorporated into petitioner's Memorandum of Law. The petition will then be in a posture for the court to resolve the merits of the appropriate claims in this habeas corpus proceeding.

IT IS FURTHER ORDERED that the original and one copy of all documents shall be filed in this case.

IT IS FURTHER ORDERED that the Clerk of the Court shall ensure that counsel has been provided with copies of everything in petitioner's file.

IT IS FURTHER ORDERED that a copy of the Petition for Writ of Habeas Corpus and this Order be served by the Clerk of the Court upon Respondent Douglas Weber and upon Mark Barnett, South Dakota Attorney

General, by certified mail pursuant to Rule 4, Rules Governing Section 2254 Cases.

IT IS FURTHER ORDERED that the Clerk of the Court forward a copy of this order to Petitioner.

IT IS FURTHER ORDERED that the Clerk of the Court forward a copy of this order to the Clerk of the South Dakota Supreme Court.

Dated April 5, 2000.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT of SOUTH DAKOTA

WESTERN DIVISION

* *

CHARLES RUSSELL RHINES, Petitioner,	]
vs.	] MOTION TO TOLL TIME
DOUGLAS WEBER, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, RESPONDENT.	] (Filed May 15, 2000)] CIV NO. 00-5020-KES

* *

COMES NOW THE PETITIONER, *CHARLES RUSSELL RHINES*, IN THE above entitled action, requesting the Untied States District Court for the Western Division of the District of South Dakota to grant this *MOTION TO TOLL TIME* in order to toll the time between the appointment and subsequent disqualification of appointed counsel Michael Butler and substitute counsel being appointed as the Petitioner's counsel of record.

1] In the context of the Antiterrorist and Effective Death Penalty act [AEDPA], the disqualification of Michael Butler does indeed pose and present a sunstantial [sic] hardship for the Petitioner in that as of April 17, 2000 the Petitioner had remaining a total of eighty-nine [89] days in which to file his final, amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and the AEDPA.

2] Counselor Butler had nearly a month [27 days] to become familiar with the Petitioner and Petitioner's case. During this period the Petitioner conferred with counselor Butler several times and laid the foundations

for his amended petition. Petitioner will now have to spend an equal amount of time conferring with alternate or substitute counsel and start the process again.

3] The AEDPA restricts the Petitioner to a maximum of one [1] year for presenting his final, amended petition to the Court. This time limitation extends from the point at which the Petitioner's South Dakota direct appeal became final by the affirmation of the conviction and sentence by the South Dakota Supreme Court.

4] If the Petitioner's elapsed time as contemplated by the AEDPA is computed and the time taken for South Dakota habeas corpus review is tolled, then as of May 10, 2000 the Petitioner has a total of 66 days remaining to file his Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and the AEDPA.

5] Petitioner's conviction and sentence became final for the purposes of the AEDPA on May 15, 1996.

6] The Petitioner filed for a writ of habeas corpus in the South Dakota Seventh Judicial Circuit Court on December 8, 1996, there-by tolling the running of the time pursuant to the AEDPA.

7] The South Dakota Supreme Court denied the Petitioner's writ of habeas corpus on February 8, 2000.

8] May 15, 1996 through December 8, 1996 equals 207 days elapsed since the Petitioner's case became final.

9] February 8, 2000 through May 10, 2000 equals an additional 92 days elapsed since the Petitioner's case became final for purposes of the "Year" envisioned by the AEDPA. This is 299 days elapsed.

10] A "year" is 365 days. Subtracting 299 days from that amount leaves 66 days for the Petitioner to research,

confer with his attorney's, read through the copious materials from discovery, draft and redraft a petition that will suffice and withstand judicial scrutiny.

11] Attorney Michael Butler was appointed to represent the Petitioner on March 20, 2000. He was subsequently disqualified as the Petitioner's counsel on April 17, 2000. This is a period of some twenty-seven [27] days.

12] The Honorable Karen E. Schreier, presiding, stated in her memorandum disqualifying Michael Butler that an alternate or substitute counsel would be appointed to represent the Petitioner within seven [7] days. [As of April 17, 2000].

13] Paragraphs #11 and #12 above account for some thirty-four [34] days of "dead time" for which the Petitioner is held accountable but for which no action of the Petitioner was the cause. Petitioner is being penalized for the actions of the State of South Dakota.

14] The petitioner did not specifically request the appointment of Michael Butler as his counsel because the Petitioner was aware that Michael Butler had testified in the Petitioner's South Dakota habeas corpus action as an "expert witness."

15] Petitioner believes that counsel Butler should have informed the District Court of his involvement in the Petitioner's case at the time of his appointment, for consideration by the District Court for disqualification prior to the April 7, 2000 status hearing. Petitioner believes that counselor Butler should have been aware that his prior involvement in the Petitioner's South Dakota habeas corpus action could be grounds for a conflict of interests, and acted accordingly within his professions' tenets of ethics.

16] The Petitioner has acted in good faith in his o Se filings before the Court and should not be per lized for the failure of appointed counsel to disclose the District Court prior involvement in the Petit ner's South Dakota habeas corpus litigation and/or c sul- tations with the Petitioner's trial counsel on irect review.

17] The Petitioner was not aware that his trial co nsels had consulted with Michael Butler on any issu or issues regarding the Petitioner's appeal of his nvic- tion and/or sentence. These consultations a not noted on any documentation that the Petition has seen nor were these consultations disclosed the Petitioner by his trial counsels.

18] The Petitioner has become aware as of April 2 2000 that the South Dakota Attorney General has gued in a similar case in South Dakota Circuit Cou that a Deputy Attorney General *SHOULD NOT E RE-MOVED* from a case simply because the Dep y At- torney General testified in that case and ay be called to again testify in that case.

19] The Petitioner believes the South Dakota A orney General argued that Michael Butler should e re- moved from the Petitioner's case simply to friv lously expend the Petitioner's extremely limited filin time. The South Dakota Attorney General has arg d the same issue in wholly inconsistent manners in highly similar circumstances and cases simply to gain an unfair advantadge [sic] over the Petitioner, rather than to insure a fair trial procedure.

20] The Petitioner argues that the State of South akota should not be rewarded, nor should the Petitioner be penalized by the use of frivolous, inconsisten argu- ments by the State of South Dakota concern ng the issue of an attorney testifying in a case an being

subject to recall as a witness in a subsequent action in the same case.

21] The Petitioner requests the District Court toll the time which attorney Michael Butler was appointed to represent the Petitioner. This was March 20, 2000 through April 17, 2000, a period of twenty-seven [27] days.

22] The Petitioner also requests the District Court to toll the time taken by the Court to appoint alternate or substitute counsel to replace Michael Butler

23] The Petitioner further requests that the same amount of time afforded to Michael Butler to become familiarized with Petitioner's case be tolled for the alternate counsel to become familiar with Petitioner's case and to confer with the Petitioner.

/s/ Charles R. Rhines
Charles R. Rhines, PETITIONER, PRO SE
SOUTH DAKOTA STATE PENITENTIARY
1600 NORTH DRIVE
SIOUX FALLS, SOUTH DAKOTA 57117
SIGNED THIS 11th DAY OF MAY, 2000.

/s/ Charles R. Rhines
CHARLES R. RHINES, PRO SE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES Petitioner, v. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	Civ. No. 00-5020-KES STATE'S RESPONSE TO PETITIONER'S MOTION TO TOLL TIME (Filed Jun. 02, 2000)

Respondent above-named hereby appears in this matter and files this response to Petitioner's "Motion to Toll Time," as required by the Court in its Order dated May 16, 2000.

The premise of Petitioner's Motion to Toll Time seems to be that the statute of limitations contained at 28 U.S.C. § 2244(d) would prohibit him from filing an amended petition if it is not done within eighty-nine days of April 17, 2000. Petitioner then proceeds to lay out a number of specific time periods. For reference, 28 U.S.C. § 2244(d) provides as follows:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

From this text, it is apparent that the premise of Petitioner's motion is faulty. For purposes of the motion, the Respondent hereby concedes that a "statute of limitation" ceases to run after a case is commenced. In the specific instance of this statute of limitation, the Eighth Circuit has specifically held that it ceases to run when Petitioner delivers his habeas corpus petition to the prison authorities for mailing to the United States District Court. The petition, document 1 on the Court's docket, is dated February 17, 2000, and was filed in this Court on February 22, 2000. Under the prison mailbox rule, therefore, no time after (presumably) February 17, 2000, will be counted

against the Petitioner in any event. In effect, the filing of the original pro se petition, if it was timely, allows petitioner to pursue his habeas corpus relief in this action, no matter how many times his petition is amended. It was timely, and the action was properly commenced, if he delivered the papers to the prison authorities for mailing within the statute of limitations. *Nichols v. Bowersox*, 172 F.3d 1068, 1073-77 (8th Cir. 1999).

For general reference of the Court, even though we concede that Petitioner's petition was timely filed, and may be amended, if the court so allows, without regard to the limitations period, we would set out the following timetable: Petitioner's conviction becomes final when the United States Supreme Court denies certiorari from his direct appeal, or when the ninety days to ask for certiorari expires. *Smith v. Bowersox*, 159 F.3d 345, 347 (8th Cir. 1998). In this case, the South Dakota Supreme Court decided Petitioner's direct appeal on May 15, 1996. A timely petition for rehearing was filed, and that was denied on June 28, 1996. This gave Petitioner until September 26, 1996, within which to file his petition for certiorari, and he did so on that date. The petition was denied on December 2, 1996, *Rhines v. South Dakota*, 519 U.S. 1013 (1996). Thus, Petitioner's conviction became final for purposes of AEDPA on that date. As the Eighth Circuit noted in *Bowersox*, 172 F.3d at 1071, no time before April 24, 1996, counts against any petitioner in any event. Since, however, Petitioner's conviction became final on December 2, 1996, the time between finality of his conviction and filing of his state habeas corpus petition does count against him. The state habeas corpus petition was filed on December 5, 1996. This means that only two days (December 3 and 4, 1996) elapsed for purposes of the

federal habeas corpus statute of limitations at that time. The petition then remained pending until decided by the South Dakota Supreme Court. *See Peterson v. Gammon*, 200 F.3d 1202, 1204 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 883-84 (8th Cir. 1999). This date was February 9, 2000. *Rhines v. Weber*, 2000 S.D. 19, 608 N.W.2d 303. The time for filing of certiorari from a state habeas determination is not excluded. *Ott v. Johnson*, 192 F.3d 510, 512-13 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 1834 (2000). Thus, in addition to the two days from December of 1996, Petitioner also had a period of either six days or twelve days in February 2000 that ran against the statute of limitations. Petitioner has had a maximum of fourteen days (more likely eight days) that have run against the statute of limitations in section 2244.

Since Petitioner is in no danger of losing his right to file for federal habeas corpus relief, there is no reason to toll the time of the statute of limitations. In addition, Petitioner has cited no authority that this Court has jurisdiction to toll this statute. The very fact that Petitioner's petition has been on file since either February 17 or February 22 of this year means that the time on the statute is not now running, at least as to the present case. It may be true that Petitioner would be in danger if the present case were dismissed. That matter can, however, be dealt with as appropriate. The filing of an amended petition or petitions will be a part of the same case, and will not endanger Petitioner's request for relief on their merits. *See* Fed. R. Civ. P. 15(c) (2).

WHEREFORE, Respondent hereby requests that Petitioner's motion to toll time be denied because it is unnecessary, only eight (or fourteen) days having run on the section 2244 one-year statute of limitations.

Dated this 1st day of June, 2000.

Respectfully submitted,

MARK BARNETT
ATTORNEY GENERAL

/s/ Craig M. Eichstadt
Craig M. Eichstadt
Deputy Attorney General
500 E. Capitol Avenue
Pierre, South Dakota
57501-5070
Telephone: (605) 773-3215

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	Civ. No. 00-5020-KES ORDER (Filed Jun. 29, 2000)

Petitioner Charles Russell Rhines filed a pro se "Motion to Toll Time" requesting tolling in the above entitled action. The South Dakota Attorney General's Office resisted petitioner's motion. Counsel for petitioner responded, agreeing with the State that filing of the original petition tolls the statute of limitation and therefore, petitioner's motion is unnecessary. Based on the foregoing, it is hereby

ORDERED that petitioner's motion to toll time (Docket 49) is denied.

Dated June 29, 2000.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES, Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	Civ. 00-5020-KES AMENDED PROCEDURAL ORDER (Filed Oct. 18, 2000)

On October 13, 2000, Petitioner filed "Motion for Extension of Time to File Amended Petition." The court has reviewed the motion, and it is hereby

ORDERED that Petitioner shall have until **November 20, 2000**, to file an Amended Petition for Writ of Habeas Corpus to include every known constitutional error or deprivation entitling Petitioner to habeas relief. *See* Rule 2(c), 28 U.S.C. foll. § 2254. Petitioner is advised that he may be presumed to have deliberately waived his right to complain of any constitutional error deprivation not raised in the Amended Petition. *See* Rule 9(b), 28 U.S.C. foll. § 2254; *see also McCleskey v. Zant*, 499 U.S. 467, 498 (1991) (abuse of the writ doctrine bars review of claims that could have been raised in a previous habeas petition absent a showing of cause and prejudice or a fundamental miscarriage of justice). Petitioner is further advised that pursuant to 28 U.S.C. § 2244, he may not file a second or successive petition in this court without prior authorization from the Eighth Circuit. Under § 2254(b)(3)(C), the grounds for obtaining such authorization are extremely limited. Consequently, it is incumbent

upon Petitioner to raise all known claims in the Amended Petition.

The Amended Petition shall set forth, in a clear and concise fashion, the legal and factual basis for each ground for relief. The factual basis shall include full citations to the appropriate portions of the record. *Additionally, Petitioner shall include in the Amended Petition a "Statement of Exhaustion," specifically asserting when and where each ground for relief was raised in the state courts. See Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998).

IT IS FURTHER ORDERED that on or before **January 19, 2001**, Respondent shall file an Answer Re: Procedural Status of Claims, which addresses the procedural status of all claims raised in the petition, specifically identifying which claims, if any, Respondent contends are unexhausted or procedurally barred from review on the merits.

IT IS FURTHER ORDERED that on or before **March 2, 2001**, Petitioner shall file a Traverse. The Traverse shall be a comprehensive responsive pleading which addresses issues of exhaustion and procedural default, and shall present alternative arguments of cause and prejudice or a fundamental miscarriage of justice, when applicable. Requests for an evidentiary hearing regarding cause and prejudice, or miscarriage of justice, shall be incorporated into Petitioner's Traverse.

IT IS FURTHER ORDERED that if Respondent files a Reply, it shall be done no later than **April 2, 2001**, after the Traverse is filed.

IT IS FURTHER ORDERED that if Petitioner files a Sur-reply, he shall do so no later than **April 16, 2001**,

after the Reply is filed. *The Sur-reply shall be limited to arguments concerning cause and prejudice or a fundamental miscarriage of justice.*

IT IS FURTHER ORDERED that after the procedural status of the claims raised in the Amended Petition are fully briefed, the court will determine which claims will be reviewed on the merits. A scheduling order will be issued that will set forth when Petitioner shall file a Memorandum of Law Re: Merits of Claims, when Respondents shall file a Response Re: Merits of Claims, and when Petitioner shall file a Reply. Requests for an evidentiary hearing shall be incorporated into Petitioner's Memorandum of Law. The Petition will then be in a posture for the court to resolve the merits of the appropriate claims in this habeas corpus proceeding.

Dated October 18, 2000.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES, Plaintiff, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Defendant.	*	CIV. 00-5020-KES **FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND STATEMENT OF EXHAUSTION** (Filed Nov. 20, 2000)

Charles Russell Rhines, for his First Amended Petition For Writ of Habeas Corpus and Statement of Exhaustion, and consistent with the Court's Procedural Order dated May 17, 2000, and the Rules Governing Section 2254 Cases in the United States District Court and Appendix thereto, states as follows:

1. Petitioner Charles Russell Rhines is imprisoned in the South Dakota State Penitentiary under a Judgment of Conviction entered in Circuit Court, Seventh Judicial Circuit, County of Pennington, State of South Dakota.

2. The date of the Judgment of Conviction was January 29, 1993.

3. The sentence imposed on Charles Russell Rhines is death by lethal injection.

4. The offenses on which Petitioner was convicted are first degree murder and third degree burglary.

5. Petitioner Charles Russell Rhines entered a plea of not guilty to the offenses charged at his preliminary hearing. Before his trial, Petitioner Rhines, through counsel, offered to plead guilty to first degree murder in exchange for a life sentence, which offer was spurned by the prosecuting attorney.

6. The conviction and sentence was obtained through jury trial.

7. Petitioner Charles Russell Rhines did not testify at trial.

8. Petitioner Charles Russell Rhines did appeal from the Judgment of Conviction.

9. The appeal from the Judgment of Conviction was to the Supreme Court of the State of South Dakota.

10. The decision of the Supreme Court of South Dakota on direct appeal is reported at *State v. Rhines*, 548 N.W.2d 415 (S.D. 1996).

11. The Judgment of Conviction and the death sentence were upheld by the South Dakota Supreme Court, notwithstanding the finding of the South Dakota Supreme Court that one of the aggravating factors relied upon by the jury to impose the death sentence was unconstitutional.

12. Petitioner Charles Russell Rhines filed an Application For Writ of Habeas Corpus in state court. Prior to this case, Petitioner Charles Russell Rhines has never filed a federal habeas corpus action to challenge his conviction.

13. Petitioner Charles Russell Rhines filed his state court Application for Writ of Habeas Corpus in Circuit Court, Seventh Judicial Circuit, State of South Dakota, Pennington County as *Rhines v. Weber*, civil file number 96-1070. The Court held an evidentiary hearing on the Petition, and issued Findings of Fact, Conclusions of Law and an Order on November 16, 1998, denying relief on the Petition. Petitioner Charles Russell Rhines appealed to the Supreme Court of South Dakota, which affirmed the lower court in a decision reported at *Rites v. Weber*, 608 N.W.2d 303 (S.D. 2000).

14. A concise statement, as contemplated in the model form for use in Applications for Habeas Corpus under 28 U.S.C. § 2254, of each ground on which claim for relief is made, including a Statement of Exhaustion as required in the Court's Procedural Order dated May 17, 2000, follows:

GROUND ONE:

The Fifth and Fourteenth Amendment rights of Mr. Rhines were infringed through admission and use at trial of Mr. Rhines' statements to law enforcement officers on June 19 and 21, 1992.

Supporting Facts:

Following the arrest of Mr. Rhines in Seattle on June 19, 1992, Mr. Rhines was questioned over the course of several hours on June 19 and June 21, 1992, by two law enforcement officers from the State of South Dakota. During the course of the interrogation, Mr. Rhines made incriminating statements that were used prominently by the State in the guilt and penalty phases of the trial. The law enforcement officers failed to give adequate warnings

as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), and its progeny, in that:

A. At no time was Mr. Rhines told that he could terminate the questioning at any time he wished;

B. At no time was Mr. Rhines told that he had the right not only to have an attorney present with him during the questioning, but also to request an attorney to be present at any point during questioning;

C. At no time was Mr. Rhines told that if he could not afford an attorney, one *would* or *must* be appointed for him;

D. At no time was Mr. Rhines told that by agreeing to answer questions, he would be waiving *Miranda* rights;

E. The statements of Mr. Rhines were involuntary in that they were procured following a statement by a South Dakota law enforcement officer implying that Mr. Rhines would not receive the death penalty.

Statement of Exhaustion:

The admission of the statements taken from Mr. Rhines on June 19 and 21, 1992, were challenged at the trial court level through Defendant's first Motion To Suppress, (Settled Record "SR" at 68-72) Supplement to First Motion to Suppress (SR at 88-95), Suppression Hearing of December 1, 1992, and an objection at trial before admission of the statements (Trial Transcript "TT" at 2415-16). These issues were raised on direct appeal (Appellant's Brief dated June 23 1994 at pp. 15-27). These

issues further were raised in the First Amended Application For Writ of Habeas Corpus (First Amended Application at p. 4, B.), and on appeal in the state habeas corpus action (Appellant's Brief dated January 20, 1999, at p. 48).

GROUND TWO:

The rights of Mr. Rhines to due process, an impartial jury, and to equal protection of the law were violated by exclusion for cause of two prospective jurors: A) Diane Staeffler and B) Jack Meyer.

Supporting Facts:

During jury selection, the State used its peremptory challenges to exclude those prospective jurors who had expressed scruples, reservations or concerns about implementation of the death penalty (TT at 430, 514, 607, 810, 1109, 1298, 1349). Running short on peremptory challenges, the State sought and the trial court allowed removal for cause of prospective juror Diane Staeffler (TT at 1618-1639). Diane Staeffler, while indicating hesitation with implementing the death penalty, indicated a willingness to follow the instructions of the Court in that regard. The Court twice denied challenges for cause by the State, yet continued to allow the State to interrogate Staeffler in an increasingly hostile fashion. The Court then granted the State's motion to excuse Ms. Staeffler for cause. The handling of prospective juror Jack Meyer was substantially similar. (TT at 332).

Statement of Exhaustion:

During the questioning of Diane Staeffler, counsel for Rhines repeatedly objected to the handling of the questioning and the motions to excuse Ms. Staeffler for cause (TT

at 1631-1639). Rhines raised a challenge to the exclusion of Diane Staeffler for cause on his direct appeal (Appellant's Brief dated June 23, 1994, at pp. 28-41). On direct appeal, this issue was raised with reference to due process rights and to the rights secured under the cases of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed. 2d 339 (1976); and *Gray v. Mississippi*, 41 U.S. 648, 107 S.Ct. 2045, 95 L.Ed. 2d 622 (1987). Mr. Rhines again raised this issue in his First Amended Application For Writ of Habeas Corpus (First Amended Application at p. 4.C.) and on appeal to the South Dakota Supreme Court from the denial of the Writ of Habeas Corpus in state court. (Appellant's Brief dated January 20, 1999 at p. 49.) The handling of juror Jack Meyer has not been separately exhausted in state court.

GROUND THREE:

The rights of Mr. Rhines to due process, an impartial jury, and equal protection of the law were violated by the State's calculated and selective use of peremptory challenges to exclude jurors with scruples or reservations about imposition of the death penalty.

Supporting Facts:

The State openly pursued a strategy to use peremptory challenges to remove jurors who demonstrated scruples, concerns or reservations about the death penalty, but who were not unequivocally opposed to imposing the death penalty in all cases. (TT at 430, 514, 607, 810, 1109, 129, 1349, 1701-02). With respect to its strategy regarding peremptory challenges, the prosecuting attorney acknowledged:

> . . . the State has worked out a strategy to specifically avoid the next juror, that is juror Larson, the next person you'll see. Our whole strategy in waiving was to avoid the possibility of having her come on without any pre-emts [sic] left when she stated on her questionnaire that it would be very difficult to impose the death penalty, that was our greatest fear and that is the reason we waived.

TT at 1701-02. The State's strategy and "greatest fear" of jurors who may have reservations about imposition of the death penalty violated the Fifth, Sixth, Eighth and Fourteenth Amendment rights and protections secured to Mr. Rhines by decisions like *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct.1770, 20 L.Ed.2d 776 (1968).

Statement of Exhaustion:

Counsel for Mr. Rhines objected during jury selection as to the tactics of the State. Counsel for Mr. Rhines also moved to have a new jury impaneled for purposes of the penalty phase. (TT at 2567-2570). Mr. Rhines raised on the direct appeal the challenge to the State's calculated and selective use of peremptory challenges, including citation to the cornerstone *Witherspoon* case. (Appellant's Brief dated June 23, 1994, at 41-45). That challenge was renewed in the First Amended Application For Writ of Habeas Corpus (First Amended Application at p. 4.D.) The issue was also raised again on appeal in the state habeas corpus action. (Appellant's Brief dated January 20, 1999, at p. 49).

GROUND FOUR:

Mr. Rhines' constitutional protection against ex post facto laws the Eighth Amendment right against cruel and unusual punishment, and rights to due process and equal protection of the law were violated by use of victim impact testimony during the penalty phase.

Supporting Facts:

The murder on which the conviction is based occurred on March 8, 1992. On July 1, 1992, an amendment to the South Dakota death penalty statutes became effective to permit victim impact testimony during the penalty phase. Citing the protection against ex post facto laws and other authority, Mr. Rhines filed a motion to exclude any such evidence or testimony, and a supplement to that motion (SR at 115-116, 141-142). The trial court reserved ruling until the day of the penalty phase proceeding, January 25, 1993, when it chose to admit such evidence. (SR at 427, TT at 2563-2567). The victim impact testimony, which was read by the victim's mother and was the last testimony to the jury during the penalty phase, was not rebuttal to any presentation by the witnesses for Mr. Rhines and was not otherwise admissible evidence in the penalty phase.

Statement of Exhaustion:

Rhines challenged the admission of the victim impact testimony at trial, both by motion and during trial. (SR at 115-16, 141-142, Motion Hearing Transcript at 12-31, 54-57, TT at 2563-2567). Rhines raised a challenge to the allowance of the victim impact statement on direct appeal. (Appellant's Brief dated June 23, 1994, at 53-70.) In the course of that appeal, Rhines referred to the ex post facto

prohibition and cited to cases involving constitutional challenges including *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); *Booth v. Maryland*, 42 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987); *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989). In his First Amended Petition for Writ of Habeas Corpus, Rhines again raised the challenge to the admission of the victim impact evidence. (First Amended Application at p. 4.G.). That challenge was likewise stated to the South Dakota Supreme Court on appeal in the state habeas corpus action. (Appellant's Brief dated January 20, 1999, at p. 50).

GROUND FIVE:

The due process, equal protection and Eighth Amendment rights of Mr. Rhines to be free from cruel and unusual punishment were infringed through imposition of the death penalty by a jury that considered an unconstitutional "depravity of mind" aggravating factor.

During the penalty phase, the Court instructed the jury under SDCL 23A-27A-1(6) on "depravity of mind" as an aggravating factor on which the jury could base imposition of a death sentence. The trial court gave the jury instructions on "depravity of mind." (SR 456-57). The State argued for imposition of the death penalty based on Mr. Rhines' alleged "depravity of mind." The jury specifically found as an aggravating factor underlying imposition of the death penalty that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved "depravity of mind" by Mr. Rhines. (SR at 481). The Supreme Court of South Dakota appropriately found that the "depravity of mind" element was unconstitutionally

vague. *State v. Rhines*, 548 N.W.2d 415, 447-449 (S.D. 1996). Nevertheless, the South Dakota Supreme Court upheld the imposition of the death sentence, despite the unconstitutional factor (and jury instructions regarding that factor) being considered by the jury. The South Dakota Supreme Court failed to undertake an appropriate harmless error analysis.

Statement of Exhaustion:

Mr. Rhines objected at trial to the giving of the instructions on "depravity of mind" (TT at 2639-2640). Mr. Rhines raised challenges to the giving of instructions on "depravity of mind" on direct appeal (Appellant's Brief dated June 23, 1994, at 77-86). Mr. Rhines raised this issue again, including the issue of the lack of harmless review analysis by the South Dakota Supreme Court, in his First Amended Petition, and on appeal of the State Habeas case to the South Dakota Supreme Court. (Appellant's Brief at pp. 37-48). During the presentation on direct appeal, Mr. Rhines cited cases involving constitutional issues, such as *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); and *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). On the appeal from the State Habeas Corpus ruling, Mr. Rhines cited federal constitutional law cases including *Zant v. Stephens*, 462 U.S. 862, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983); *Clemons v. Mississippi*, 494 U.S. 738, 108 L.Ed.2d 725, 110 S.Ct. 1441 (1990): *Sochor v. Florida*, 504 U.S. 527, 119 L.Ed.2d 326, 112 S.Ct. 2114 (1992); *Stringer v. Black*, 503 U.S. 222, 117 L.Ed.2d 367, 112 S.Ct. 1130 (1992); and *Chapman v. California*, 386 U.S. 18, 17 L.Ed.2d765, 875 S.Ct., 824 (1967).

GROUND SIX:

Mr. Rhines' rights to due process, equal protection and to be free from cruel and unusual punishment were violated on account of the unconstitutionality of the South Dakota capital punishment statutes in several respects.

Supporting Facts:

Mr. Rhines was given a sentence of death under the South Dakota capital punishment scheme that existed under SDCL 23A-27A as of January of 1993. The South Dakota death penalty statutes were unconstitutional in the following respects.

A. The listing of aggravating circumstances under SDCL 23A-27A-1 does not adequately limit "death eligible" defendants or offenses;

B. The South Dakota capital punishment statutes contain insufficient standards to guide the sentencer's discretion in determining whether a particular defendant will or will not receive a death sentence;

C. The South Dakota death penalty statutes mandate a sentence of death upon a jury recommendation, unconstitutionally foreclosing discretion of a trial judge in sentencing;

D. The South Dakota death penalty statutes require judicial proportionality review, without providing adequate guidance or a means of collecting information on death penalty cases;

E. The South Dakota death penalty statutes in SDCL 23A-27A-1, mandate that the court

"shall consider, or shall include in instructions to the jury" death penalty provisions "in all cases for which the death penalty may be authorized," which is all Class A felonies under SDCL 22-6-1.

Statement of Exhaustion.

Such challenges to the constitutionality of the South Dakota Capital punishment statutes were raised in Pre-Trial Motions. (SR at 96-103). Such matters were argued by Mr. Rhines at the trial court level (Motion Hearing at 12-31). On direct appeal from the conviction, Mr. Rhines raised such challenges. (Appellant's Brief dated June 23, 1994 at pp. 45-53). Such issues were raised again in the state habeas corpus petition and to the South Dakota Supreme Court on appeal therefrom. (Appellant's Brief dated January 20, 1999, at pp. 49-50). Issue Six E. was not directly raised previously by Rhines, but is futile to pursue in state court in light of the South Dakota Supreme Court ruling in *State v. Moeller*, 616 N.W.2d 424, 463 (S.D. 2000).

GROUND SEVEN:

The Fifth Amendment right to due process, the Eighth Amendment rights to be free from cruel and unusual punishment and the equal protection rights of Mr. Rhines were violated by improper jury instructions during the penalty phase.

Supporting Facts.

The following errors occurred in the jury instructions during the penalty phase of Mr. Rhines' trial:

A. The trial court instructed on "depravity of mind" as a circumstance for imposing the death penalty, which was later held to be unconstitutional.

B. The trial court erred in its instruction on the meaning of SDCL 23A-27A-1(3);

C. The trial court erred in refusing the giving of a proposed instruction by Charles Raines regarding the procedure for the jury to follow in arriving at their sentence (SR at 445, Proposed Instruction 8);

D The trial court refused to give Rhines' proposed instruction 9 regarding the presumption of innocence of aggravating circumstances (SR at 446);

E. The trial court refused to give proposed instruction 11 regarding the meaning of the death sentence and life imprisonment (SR at 448).

F. The trial court failed to comprehend the reasons for the jury note and failed to deal properly with instructing the jury in light of its jury note.

In the midst of deliberation on the penalty phase, the jury sent a note to the Court indicating confusion over the meaning of life without parole, what petitioner's living conditions and privileges might be if he received life in prison, and other such things. The jury thus indicated an uncertainty over the instructions from the Court, which could have and should have been resolved through Rhines' proposed instructions.

Statement of Exhaustion:

The above-listed challenges to the jury instructions were presented to the trial court and presented on direct appeal (Appellant's Brief dated June 23, 1994 at 86-92, 109-116). In that discussion, Rhines referred to constitutional rights and cited constitutional authority such as *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct 2809, 49 L.Ed.2d 859 (1976), and other such authority. In the state habeas corpus case, Mr. Rhines again presented such arguments in the First Amended Petition and to the South Dakota Supreme Court on appeal. (Appellant's Brief dated January 20, 1999, at 57).

GROUND EIGHT:

There was constitutionally insufficient evidence to support a finding of certain aggravating circumstances.

Supporting Facts:

Based on the instructions of the trial court, the jury found that the offense involved "torture" and was perpetrated to obtain money. Given the way those terms should apply in the context of the death penalty and in the context of sufficiency of the evidence under the Fifth Amendment, Eighth Amendment, and Equal Protection Clause, there was insufficient evidence to find either of those aggravating circumstances beyond a reasonable doubt.

Statement of Exhaustion.

Rhines raised the above-stated grounds on his direct appeal (Appellant Brief dated June 23, 1994 at 86-93, 70-77). These grounds were again stated in the First

Amended Petition and on appeal to the South Dakota Supreme Court in the state habeas action. (Appellant's Brief dated January 20, 1999 at 50-51).

GROUND NINE

Mr. Rhines' Fifth Amendment right to due process of law and the Sixth Amendment right to assistance of counsel were violated through the ineffective assistance of his trial counsel.

Supporting Facts:

Mr. Rhines was represented at trial level by Wayne Gilbert and Joseph Butler. The Court also appointed public defender Michael Stonefield as the investigator. The ineffective assistance of trial counsel manifested itself in multiple ways including:

A. The absence of any true mitigation investigation on behalf of Rhines;

B. The tepid presentation of evidence during the penalty phase by the attorneys for Mr. Rhines, including failure to contact or call available witnesses – including, but not limited to, John Fousek, James Mighell and Connie Royer – who would have provided helpful testimony for Mr. Rhines in the penalty phase;

C. The failure to present to the jury during the penalty phase any information about Rhines' willingness to accept culpability, whether through information on Rhines' effort to plead guilty to first degree murder or through Rhines' right to give an allocution to the jury at the penalty phase;

D. The failure of the defense team to make a motion in limine and objections to prevent presentation of information on the homosexuality of Charles Rhines, and instead publicizing to the jury Rhines' homosexuality during voir dire;

E. The inappropriate and ineffective handling of the jury note raising questions during penalty phase deliberations about Mr. Rhines personally and the meaning of life imprisonment;

F. The need for the appointed investigator, Michael Stonefield, to take over much of the defense work in the case due to problems with the defense team;

G. The ineffective representation of Mr. Rhines by one attorney who was suffering from depression and later disbarred for theft, a second attorney who openly and repeated told the jury that he supported the death penalty, and a third attorney who was supposed to be the "investigator" and ended up doing the majority of the work.

H. The failure to catch and correct erroneous and false, yet highly prejudicial, testimony from Glen Wishard.

I. The failure to request the hiring of, consult with, or hire a mitigation consultant or expert.

J. The failure of trial counsel to register objections to keep out irrelevant yet prejudicial testimony such as Rhines having access to a gun, a statement by Rhines at the victim's funeral.

Statement of Exhaustion:

Petitioner believes that the issues listed as A through G were raised in the First Amended Application For Writ of Habeas Corpus and in turn on the appeal to the South Dakota Supreme Court in the state habeas corpus action. (Appellant's Brief dated January 20, 1999 at 9, 17-37.) In his presentation of these claims, Rhines relied upon the seminal constitutional case in this realm of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

GROUND TEN:

The rights of Mr. Rhines to due process, equal protection under law, and to be free from cruel and unusual punishment were violated by the Court's errors in its proportionality review and review of whether imposition of the death penalty was under passion, prejudice or other arbitrary factors.

Supporting Facts:

Under SDCL 23A-27A-12 and consistent with constitutional protections under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, the Supreme Court of South Dakota was obliged to and undertook an analysis of: 1) Whether the death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, 2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; and 3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. In conducting its review, the Supreme Court of South Dakota neglected information indicative of imposition of the death

sentence based on passion, prejudice or arbitrary factors. The Supreme Court of South Dakota also took an unconstitutionally narrow view of "similar cases" in conducting its proportionality analysis.

Statement of Exhaustion:

Mr. Rhines presented these issues on direct appeal to the Supreme Court of South Dakota. (Appellant's Brief dated June 23, 1994 at 113-122). These issues also were addressed in Appellant's Proportionality Review Brief dated January 18, 1995, and Appellant's Proportionality Review Reply Brief dated March 3, 1995. The Supreme Court of South Dakota was aware of the constitutional implications of such a review in citing *Gregg v. Georgia*, 428 US 153, 96 S.Ct. 2809, 47 L.Ed.2d 859 (1976) in its discussion on the topic. *See State v. Rhines*, 548 N.W.2d 415, 455 (S.D. 1996).

GROUND ELEVEN:

The due process rights and right to adequate assistance of counsel of Rhines were violated by the refusal of the trial court to appoint a forensic communication expert.

Supporting Facts:

Before trial, Rhines, who is indigent, moved for appointment of a forensic communication expert for the purpose of designing, pre-testing, conducting and analyzing a community attitude survey and preparation of a jury questionnaire. The motion was made both for venue considerations and trial preparation. SR at 38-58. The cost of such work likely would have ranged between $4,000 and $7,000. SR at 38-58. Part of the purposes of such a survey

would be to instruct counsel on dealing with the homosexuality of Mr. Rhines. (Appellant's Brief dated June 23, 1994 at 107 (quoting 11/3/92 letter from counsel to Judge Konnenkamp)). The trial court denied the request.

Statement of Exhaustion:

Rhines, in his appeal to the Supreme Court of South Dakota, raised this issue. (Appellant's Brief dated June 23, 1994 at 106-109). The Supreme Court of South Dakota granted no relief in this regard.

GROUND TWELVE:

The due process and equal protection rights of Mr. Rhines were violated by various acts of prosecutorial misconduct.

Supporting Grounds:

The prosecutor committed prosecutorial misconduct in maintaining that the victim's hands were tied prior to the fatal wound, when the evidence was to the effect that they were tied afterwards; in referring to the victim being "gutted" in the assault when there was no such evidence; using and arguing from false and erroneous testimony from witness Glen Wishard; and using the improper tactic of eliminating all jurors with any misgivings about imposition of the death penalty.

Statement of Exhaustion:

The illicit tactic of the prosecution in eliminating the claim all jurors with scruples or misgivings about the death penalty overlaps Ground Two above and the claim

was exhausted for the reasons set forth above in Ground Two. The other instances of prosecutorial misconduct have not been raised previously but fall within *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963), and its progeny.

GROUND THIRTEEN:

The Fifth, Sixth and Fourteenth Amendment rights of Mr. Rhines were violated as a result of the failure to have Mr. Rhines present or allow him to participate in the handling of the jury note and response to the jury note.

Supporting Grounds:

In the midst of jury deliberations, the jury delivered to the Court a note setting forth myriad questions regarding the meaning and nature of life imprisonment, among other things. Mr. Rhines was not made aware of the note at the time, nor included in the hearing to resolve how to respond to the note.

Statement of Exhaustion:

While issues surrounding the handling of the jury note have been raised on direct appeal and in the habeas corpus case, this precise claim has not been raised previously.

15. Petitioner Charles Russell Rhines believes that each of the above-stated grounds have been exhausted either on direct appeal or through the state habeas corpus action, or both, as set forth in the separate statement of exhaustion sections after each ground.

16. Petitioner Rhines has no petition or appeal now pending in any court, either state or federal, as to the judgment under attack, other than this action.

17. The names and addresses of each attorney who represented Charles Russell Rhines at various stages are the following:

a. At the preliminary hearing, arraignment and plea, trial, sentencing, and on direct appeal:

Lead Attorney:	Wayne Gilbert, (not practicing), 1529 Forest Hill Drive, Rapid City, South Dakota, 57701
Second Attorney:	Joseph M. Butler, Bangs, McCullen, Butler Foye & Simmons, P. O. Box 2670, Rapid City, South Dakota, 57709
Investigator/ Attorney:	Michael Stonefield, Pennington County Public Defender's Office, 315 St. Joseph Street, # 44, Rapid City, South Dakota, 57701

b. On the State Habeas Corpus proceeding and appeal therefrom:

Michael W. Hanson, 505 West 9th Street, #202, Sioux Falls, South Dakota, 57104.

18. Petitioner Rhines was sentenced on January 29, 1993, on all charges in the case, with the sentence imposed for the first degree murder conviction being death by lethal injection.

PRAYER

Wherefore, Petitioner Charles Russell Rhines prays that the Court grant Petitioner all relief to which he may be entitled in this proceeding.

Dated at Sioux Falls, South Dakota, this 16th day of November, 2000.

DAVENPORT, EVANS,
HURWITZ & SMITH, L.L.P.

/s/ Roberto A. Lange
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Facsimile: (605) 336-6842
Attorneys for Defendant
Charles Russell Rhines

I declare under penalty of perjury that the foregoing is true and correct to my best knowledge.

Exercised on this 16 day of November, 2000.

/s/ Charles Russell Rhines
Charles Russell Rhines

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES, Petitioner, v. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	Civ. 00-5020-KES STATE'S RESPONSE TO PROCEDURAL ORDER AND MOTION TO DISMISS (Filed Jan. 22, 2001)

COMES NOW, Respondent in the above-entitled matter, by and through his counsel of record, and hereby responds to the Procedural Order entered by this Court on May 17, 2000, as follows:

1. Throughout this Response, Respondent will be referred to [sic] "Respondent" or "State." Petitioner, Charles Russell Rhines, will be referred to as "Petitioner." References to the Settled Record from Petitioner's criminal case, Pennington County File No. 93-81, will be indicated by "SR." References to the criminal trial transcripts will be designated by "TT." References to the Pennington County State Habeas Corpus Settled Record, Pennington County Civ. No. 96-1070, will be indicated by "SRHC." References to the Habeas Corpus Hearing transcripts will be designated by "HCT." All references will be followed by the applicable page number(s).

2. In discussions with the Pennington County Clerk of Court's Office, counsel for Respondent was informed that both the criminal and the civil habeas corpus file in

this matter, as referred to in paragraph 1, were sent to the federal district court on March 29, 2000. Therefore, Respondent will not be forwarding either file to this Court with its Procedural Response.

3. At present, Petitioner is lawfully incarcerated at the South Dakota State Penitentiary in Sioux Falls, South Dakota, by authority of a Judgment of Conviction entered by the Honorable John K. Konenkamp. Petitioner's Judgment of Conviction in Pennington County Criminal File 93-81 occurred when a Pennington County jury found him guilty of premeditated first-degree murder and third degree burglary. SR 426, 483.

4. Pursuant to SDCL 23A-27A-2, a presentence hearing was held before the same jury panel on January 25, 1993. On January 26, 1993, the jury returned a sentence of death by lethal injection, finding four aggravating circumstances to exist in connection with the death of Donnivan Schaeffer: (1) the offense of first-degree murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture; (2) the offense of first-degree murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind; (3) the offense of first-degree murder was committed for the purpose of avoiding, interfering with, or preventing lawful arrest; and (4) Defendant committed the offense of first-degree murder for himself for the purpose of receiving money. SR 481, 482.

5. On January 29, 1993, the trial court filed a warrant of death sentence and execution. SR 483, 484. Judgment of guilty of first-degree murder was entered on January 29, 1993. Petitioner was sentenced to death by lethal injection pursuant to SDCL ch. 23A-27A for the

crime of first-degree murder. SR 485, 487. Judgment was entered against Petitioner for third-degree burglary on the same date. Petitioner was sentenced to ten years in the South Dakota State Penitentiary on the burglary conviction. SR 488, 489. On February 16, 1993, the State dismissed the habitual offender information filed against Petitioner pursuant to SDCL 23A-44-2. SR 584.

6. The South Dakota Supreme Court affirmed Petitioner's Judgment of Conviction and Sentence, as set forth in paragraphs 3 and 4, in his direct appeal. *State v. Rhines*, 1996 S.D. 55, 548 N.W.2d 415, *cert. denied, Rhines v. South Dakota*, 519 U.S. 1013, 117 S.Ct. 522, 136 L.Ed.2d 410 (1996). One copy of the South Dakota Supreme Court file and decision affirming Petitioner's conviction and sentence is included with the State's Response and is being sent to the Court. Petitioner raised the following 14 issues in his direct appeal:

I. Whether the trial court erred by not suppressing Rhines' statements of June 19, and 21, 1992.

II. Whether the trial court erred in excusing prospective juror Diane Staeffler for cause.

III. Whether the State's calculated and selective use of peremptory [sic] challenges to exclude prospective jurors with reservations about the death penalty violated due process.

IV. Whether the South Dakota capital punishment statutes are constitutional.

V. Whether the trial court erred by allowing victim impact testimony.

VI. Whether the evidence was sufficient to sustain the jury's finding of torture under aggravating circumstance § 23A-27A-1(6).

VII. Whether the trial court erred in its instructions regarding aggravating circumstance § 23A-27A-1(6), depravity of mind.

VIII. Whether the trial court erred in its instructions regarding aggravating circumstances § 23A-27A-1(3).

IX. Whether the jury's consideration of one or more invalid aggravating circumstances requires reversal of the death sentence.

X. Whether the trial court erred by allowing into evidence statements made by Rhines concerning the justice system.

XI. Whether the trial court erred in refusing to appoint a forensic communication expert.

XII. Whether the trial court erred by refusing several of Rhines' proposed jury instructions.

XIII. Whether the death sentence was imposed under the influence of passion, prejudice or other arbitrary factors.

XIV. Whether this court should conduct its statutorily-required proportionality review using a broad pool of "similar cases," and allow presentation at a later time of further evidence and arguments on proportionality.

One copy of Petitioner's and State's briefs, including the proportionality briefs, filed with the South Dakota

Supreme Court in Petitioner's direct appeal, are included with the State's Response and is being sent to the Court.

7. Petitioner filed an Application for Writ of Habeas Corpus in Circuit Court, Seventh Judicial Circuit, Pennington County, South Dakota on December 5, 1996. SRHC 1-2. An Amended Second Application for Writ of Habeas Corpus was filed by Petitioner on October 20, 1995. An evidentiary hearing was held before the Honorable Merton B. Tice, on April 6, 1998, with subsequent testimony of Michael Butler being introduced by way of deposition on June 5, 1998. The habeas court issued a written opinion, dated October 8, 1998, which denied the amended application and quashed the writ. SRHC 332-343. Findings of Fact, Conclusions of Law and Order were entered on November 16, 1998. SRHC 426-471.

8. Petitioner appealed to the South Dakota Supreme Court from the Order denying Petitioner habeas corpus relief. The South Dakota Supreme Court affirmed the circuit court Order denying Petitioner's Application for Writ of Habeas Corpus. *Rhines v. Weber*, 2000 S.D. 19, 608 N.W.2d 303. One copy of the South Dakota Supreme Court file and decision affirming the denial for habeas corpus relief is included with the State's Response and is being sent to the Court. Respondent raised the following 25 issues on appeal:

(1) Charles Russell Rhines had ineffective assistance of counsel:

A. One of Charles Russell Rhines' counsel was depressed and engaged in theft during the representation.

B. One of Charles Russell Rhines' counsel told the jury during closing, argument at

the penalty phase of the trial, that he supported the death penalty.

C. Charles Russell Rhines' counsel failed to raise in the direct appeal, the failure of the trial court to specifically answer the jury's question on prison life.

D. Charles Russell Rhines' counsel did not argue the case of *Simmons v. South Carolina*, 512 U.S. 154, 124 L.Ed.2d 133, 114 S.Ct. 2187 (1994), in the direct appeal.

E. Charles Russell Rhines' counsel did not attempt to exclude the fact that he is homosexual.

F. Charles Russell Rhines' counsel should have attempted to let him make an unsworn allocution to the jury at the penalty phase of the trial.

G. Charles Russell Rhines' counsel did not attempt to suppress his confession by means other than inadequate advisement of the Miranda Rights.

H. Charles Russell Rhines' counsel did not submit jury instructions directing the jury not to consider the number of possible aggravating circumstances.

I. Charles Russell Rhines' counsel failed to investigate his background for mitigation evidence.

J. Charles Russell Rhines' counsel were ineffective by not obtaining and submitting a letter to the state offering to plead guilty in return for a life sentence.

(2) That the Eighth Amendment required the South Dakota Supreme Court to perform harmless error analysis on the effect of the sentencing jury's consideration of an invalid statutory aggravating circumstance, before it could uphold the jury's death sentence.

(3) The Eighth Amendment error which occurred at Charles Russell Rhines' sentencing trial was not cured by the South Dakota Supreme Court's affirmance of his death sentence, when that court did not conduct harmless error analysis on the effect of the sentencing jury's consideration of an invalid statutory aggravating circumstance, when the State's penalty argument suggested to the jury that Charles Russell Rhines was more deserving of the death penalty because of the number of aggravating circumstances in his case.

(4) The trial court erred by not suppressing Charles Russell Rhines Statements of June 19 and 21, 1992.

(5) The trial court erred in excusing prospective juror Diane Staeffler for cause.

(6) The State's calculated and selective use of peremptory challenges to exclude prospective jurors with reservations about the death penalty violated due process.

(7) The South Dakota capital punishment statutes are unconstitutional.

(8) The trial court erred by allowing victim impact testimony.

(9) The evidence was insufficient to sustain the jury's finding of torture under aggravating circumstance § 23A-27A-1(6).

(10) The trial court erred in its instructions regarding aggravating circumstances § 23A-27A-1(3).

(11) The jury's consideration of one or more invalid aggravating circumstances requires reversal of the death sentence.

(12) The trial court erred by allowing into evidence statements made by Charles Russell Rhines concerning the justice system.

(13) The trial court erred in refusing to appoint a forensic communication expert.

(14) The trial court erred by refusing several of Charles Russell Rhines proposed jury instructions.

(15) The death sentence was imposed under the influence of passion, prejudice or other arbitrary factors.

(16) This court should conduct its statutorily-required proportionality review using a broad pool of "similar cases," and allow presentation at a later time of further evidence and arguments on proportionality.

One copy of Respondent's Brief and Reply Brief, along with Petitioner's Brief, are included with the State's Response and is being sent to the Court.

9. In Petitioner's present federal Application for Habeas Corpus Relief, Petitioner raises 22 issues:

1. The Fifth and Fourteenth Amendment rights of Mr. Rhines were infringed through admission and use at trial of Mr. Rhines' statements to law enforcement officers on June 19 and 21, 1992.

2. The rights of Mr. Rhines to due process, an impartial jury, and to equal protection of the law were violated by exclusion for cause of two prospective jurors: A) Diane Staeffler and B) Jack Meyer.

3. The rights of Mr. Rhines to due process, an impartial jury, and equal protection of the law were violated by the State's calculated and selective use of peremptory challenges to exclude jurors with scruples or reservations about imposition of the death penalty.

4. Mr. Rhines' constitutional protection against ex post facto laws, the Eighth Amendment right against cruel and unusual punishment, and right to due process and equal protection of the law were violated by use of victim impact testimony during the penalty phase.

5. The due process, equal protection and Eighth Amendment rights of Mr. Rhines to be free from cruel and unusual punishment were infringed through imposition of the death penalty by a jury that considered an unconstitutional "depravity of mind" aggravating factor.

6. Mr. Rhines' rights to due process, equal protection and to be free from cruel and unusual punishment were violated on account of the unconstitutionality of the

South Dakota capital punishment statutes in several respects.

7. The Fifth Amendment right to due process, the Eighth Amendment rights to be free from cruel and unusual punishment and the equal protection rights of Mr. Rhines were violated by improper jury instructions during the penalty phase.

8. There was constitutionally insufficient evidence to support a finding of certain aggravating circumstances.

9. Mr. Rhines' Fifth Amendment right to due process of law and the Sixth Amendment right to assistance of counsel were violated through the ineffective assistance of his trial counsel.

A. The absence of any true mitigation investigation on behalf of Rhines;

B. The tepid presentation of evidence during the penalty phase by the attorneys for Mr. Rhines, including failure to contact or call available witnesses – including, but not limited to, John Foursek, James Mighell and Connie Royer – who would have provided helpful testimony for Mr. Rhines in the penalty phase;

C. The failure to present to the jury during the penalty phase any information about Rhines' willingness to accept culpability, whether through information on Rhines' effort to plead guilty to first degree murder or through Rhines' right to give an allocution to the jury at the penalty phase;

D. The failure of the defense team to make a motion in limine and objections to prevent presentation of information on the homosexuality of Charles Rhines, and instead publicizing to the jury Rhines' homosexuality during voir dire;

E. The inappropriate and ineffective handling of the jury note raising questions during penalty phase deliberations about Mr. Rhines personally and the meaning of life imprisonment;

F. The need for the appointed investigator, Michael Stonefield, to take over much of the defense work in the case due to problems with the defense team;

G. The ineffective representation of Mr. Rhines by one attorney who was suffering from depression and later disbarred for theft, a second attorney who openly and repeated [sic] told the jury that he supported the death penalty, and a third attorney who was supposed to be the "investigator" and ended up doing the majority of the work.

H. The failure to catch and correct erroneous and false, yet highly prejudicial testimony from Glen Wishard.

I. The failure to request the hiring of, consult with, or hire a mitigation consultant or expert.

J. The failure to [sic] trial counsel to register objections to keep out irrelevant yet prejudicial testimony such as Rhines having

access to a gun, a statement by Rhines at the victim's funeral.

10. The rights of Mr. Rhines to due process, equal protection under law, and to be free from cruel and unusual punishment were violated by the Court's errors in its proportionality review and review of whether imposition of the death penalty was under passion, prejudice or other arbitrary factors.

11. The due process rights and right to adequate assistance of counsel of Rhines were violated by the refusal of the trial court to appoint a forensic communication expert.

12. The due process and equal protection rights of Mr. Rhines were violated by various acts of prosecutorial misconduct.

13. The Fifth, Sixth and Fourteenth Amendment rights of Mr. Rhines were violated as a result of the failure to have Mr. Rhines present or allow him to participate in the handling of the jury note and response to the jury note.

FIRST MOTION TO DISMISS

10. The above-named Respondent respectfully moves this Court for an Order, pursuant to F.R.C.P. 12(b)(6), 28 U.S.C. 2254 dismissing Grounds 2 (equal protection claim as to Staeffler and Meyer, and all claims as to Meyer); 3 (equal protection claim, Fifth & Eighth Amendment claims); 4 (equal protection and due process); 6(E); 9 (all Fifth Amendment claims); 9(B) (Sixth Amendment claim); 9(H) (Sixth Amendment claim); 9(I) (Sixth Amendment

claim); 9(J) (Sixth Amendment claim); 10 (due process, equal protection and Eighth Amendment claims); 12; and 13, of Petitioner's First Amended Petition for Writ of Habeas Corpus because these issues have been procedurally defaulted.

11. In the first amended petition for writ of habeas corpus, Petitioner states a number of claims that were not presented to the state courts, or were never presented nor attempted to be presented to the South Dakota Supreme Court. The purpose of this response is, in part, to set out the Respondent's view on the procedural status of Petitioner's various claims. For that reason, this pleading does not make a substantive response to the Petition. Rather, it addresses procedural issues, and also moves to dismiss certain claims that are either procedurally defaulted, or are without merit on their face. These claims are without merit because they do not state federal claims, or because it is plain that there is no ruling of the state courts "contrary to or [which] involves an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States", nor is there an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

28 U.S.C. § 2254(b) sets out the statutory principles of exhaustion of state remedies before a federal habeas case may be decided. That subsection reads as follows:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

28 U.S.C. § 2254(c) emphasizes that there must be complete exhaustion, in that if Petitioner has the right to raise a given issue in state court by *any* means, he must do so.

Eighth Circuit law prior to these statutes is basically consistent with them. The statutes may require somewhat stricter exhaustion standards than were previously in place, with the exception that the writ may be *denied* on the merits without exhaustion. At least two methods of exhaustion have been recognized. In *Smittie v. Lockhart*, 843 F.2d 295, 296-97 (8th Cir. 1988), the court explained exhaustion by presentation of issues to the state courts, as well as exhaustion by futility of state remedies (that is, having no presently available state remedy). Exhausting by presenting the claim requires that the same issue be

presented to the State's highest court, or that all methods for attempting to present the issue be undertaken. Appropriately presenting the issue was explained in *Kelly v. Trickey*, 844 F.2d 557, 558-59 (8th Cir. 1988), as requiring reference before the state court to "a specific federal constitutional right, the particular constitutional provision, or a federal or state constitutional case raising the same federal issue." In addition, the federal petition must allege both the same facts *and* an identical legal issue to that alleged in the state court in order to exhaust the issue. *See Martin v. Solem*, 801 F.2d 324, 330 (8th Cir. 1988). The habeas petitioner must fairly present to the state court the substance of his or her federal habeas claim. Put another way, the habeas petitioner must provide the state courts with a fair opportunity to apply the controlling legal principles to the facts bearing on the federal constitutional claim. It is not enough that the facts necessary to support the federal claim were before the state courts or that a somewhat similar state law claim was made. The same facts must be asserted and the same federal constitutional issue must also be asserted before the state's highest court. *Id.*, citing *Anderson v. Harless*, 459 U.S. 4 (1982).

Based on these standards, Petitioner has failed to exhaust, by presentation, a number of his issues. Those are pointed out below. In spite of this failure to present, however, Petitioner's remedies are exhausted because Petitioner cannot now return to the state courts to assert these issues. Such a return to state court would be futile. This is shown by at least two South Dakota Supreme Court cases. In *Ashker v. Class*, 534 N.W.2d 66, 67 (S.D. 1995), the South Dakota Supreme Court held that "cause and prejudice" must be shown in order for a Petitioner to

bring a second habeas petition after he has already had one such petition determined in the state courts. This cause and prejudice standard is the same standard used by the federal courts to overcome procedural default, see below. *Id.* All of the issues Petitioner now seeks to raise, which were not previously presented to the state courts, were apparent on the record at the time of his state habeas petition and appeal. He cannot, therefore show cause and prejudice for not raising them in his one state habeas petition. The case of *In the Matter of the Application of Kurt A. Novaock for Writ of Habeas Corpus and Alternatively for a Writ of Error Coram Nobis*, 1998 S.D. 3, 572 N.W.2d 840 has the same holding as *Ashker*. In addition to reasserting the principles of *Ashker*, *Novaock*, 1998 S.D. 3, ¶ 6, 572 N.W.2d at 842, the Court further held, *id.* at ¶ 13, n.3, 572 N.W.2d at 844, n.3, that inability to overcome cause and prejudice standards does not render the statute unavailable or inadequate so as to allow for a writ of error coram nobis. It would be futile for Petitioner to return to state court: He has no currently available remedy there, whether habeas corpus or coram nobis. Petitioner's remedies are exhausted by presentation as to some issues, but as to those issues not presented, they are exhausted because there is no presently available state remedy.

Since all of the issues Petitioner presents are exhausted In one way or another, the next step, under *Smittie v. Lockhart*, is for the court to proceed to analyze procedural default. The concept of procedural default is generally traced back to *Wainwright v. Sykes*, 443 U.S. 72, 81, 87 (1977). Although it is related to exhaustion, it is a separate concept. *Smittie*, 843 F.2d at 296. The four-step process outlined in *Smittie* states that if a claim has not

been fairly presented to the state courts, the court must determine whether there are any currently available state remedies. Petitioner fairly presented some issues, others he did not. If the State remedy is not currently available, and if that issue has not been fairly presented, then there is a procedural default. *Smittie*, 843 F.2d at 296. The United States Supreme Court has held that failure to seek discretionary review in a state supreme court is one way of defaulting, and when a petitioner has failed to do that, he or she has not satisfied the presentation requirement. *O'Sullivan v. Boerckel*, 119 S.Ct. 1728 (1999). If there is a procedural default, the default may be overcome, and habeas relief may only be considered, if the petitioner can show cause for the default and actual prejudice as a result, or if Petitioner can demonstrate that failure to consider the claim will result in conviction of someone who is actually innocent of the underlying crime. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

The court explained in *Coleman* the basis of the *Wainwright* procedural default rules. The United States Supreme Court has held that it will not review a question of federal law decided by a state court if the decision of a state court rests on a state law ground that is independent of the federal question and adequate to support the court's judgment. *Coleman*, 501 U.S. at 729. This rule arises out of the concept of federalism, that is, the judgment ought not to be reversed where state law supports it independent of any federal issues. The Supreme Court applies the same rule to the claims of state prisoners in habeas corpus actions. *Coleman*, 501 U.S. at 729-730. The doctrine applies to bar federal habeas corpus when a state court declines to address a prisoner's federal claim or claims because the prisoner failed to meet a state procedural

requirement. The state judgment, in such cases, rests on independent and adequate state law procedural grounds. *Id.* (Citing *Wainwright*, 433 U.S. at 81, 87). The court, in *Coleman*, said that both the exhaustion and procedural default rules serve the same purpose and are grounded on principles of comity. *Coleman*, 501 U.S. at 731-32. The court noted that one may meet the exhaustion requirement by defaulting a federal claim in state court, but that the "independent and adequate state ground" doctrine insures that the State's interest in correcting its own mistakes is respected in all federal habeas cases, not merely in those when there has been a failure to exhaust. Thus, the procedural default rule must be applied to those cases where Petitioner has exhausted by failing to exercise his state remedies.

The claims that Petitioner has not made in state court are procedurally defaulted, and must be dismissed pursuant to procedural default doctrine. South Dakota Supreme court precedent, *Ashker* and *Novaock*, clearly states that neither habeas nor coram nobis relief is presently available, and Petitioner failed to ask for such relief on certain issues when it was available. Under the analysis required in *Smittie v. Lockhart*, 843 F.2d at 296, the court must then proceed to determine whether there is cause and prejudice for these failures to present, and also whether there is a fundamental miscarriage of justice. There is no fundamental miscarriage of justice because Petitioner confessed; he is not innocent.

This leaves the cause and prejudice standard. In general, it is worth noting that if Petitioner blames the failure to raise these constitutional violations on his habeas lawyer, that contention does not show cause. *Coleman*, 501 U.S. at 752-54. Attorney error, ignorance, or

inadvertence by state habeas or post conviction counsel cannot provide cause under the rules of *Wainwright*. There is no federal constitutional right to assistance of counsel once direct appeals are finished. In addition, it is not "cause" under the Wainwright rules that state courts have not ruled because issues have not been raised. This failure to raise or failure to rule are, of course, the very essence of procedural default. The *default itself* cannot constitute cause. *Coleman*, 501 U.S. at 752-54.

Further, no prejudice is shown in this case. There is no reason to believe that the result would have been different if any of the defaulted issues had been raised. The standard of actual prejudice requires more than a showing that there might have been a change in outcome. Petitioner must show that the alleged errors worked to his actual and substantial disadvantage, and infected the entire trial with error of constitutional dimension. *Murray v. Carrier*, 477 U.S. 478, 494 (1986).

SECOND MOTION TO DISMISS

12. In the alternative, the above-named Respondent respectfully moves this Court for an Order, pursuant to F.R.C.P., Rule 12(b)(6), dismissing Ground 10 (state law proportionality review) of Petitioner's Petition for Writ of Habeas Corpus because this ground (if proven) does not raise a federal quest on (in violation of the Constitution or laws or treaties of the United States).

Federal habeas corpus is available only on behalf of a person in custody in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S.Ct. 457, 480, 116 L.Ed.2d 385 (1991); *Engle v. Isaac*, 456 U.S. 107, 119, 102

S.Ct. 1558, 1567, 71 L.Ed.2d 783 (1982). Federal habeas is unavailable to retry state issues. *Milton v. Wainwright*, 407 U.S. 371, 377, 92 S.Ct. 2174, 2178, 33 L.Ed.2d 1 (1972). "A federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 337, 341, 104 S.Ct. 871, 874-75, 79 L.Ed.2d 29 (1989).

If an issue alleges only a violation of state law, no federal claim is presented, and the petition is subject to dismissal for failure to state a claim. *Cox v. Lockhart*, 970 F.2d 448 (8th Cir. 1992).

THIRD MOTION TO DISMISS

13. The above-named Respondent respectfully moves this Court for an Order, pursuant to F.R.C.P. 12(b)(6) and 28 U.S.C. § 2254(d), dismissing all claims "adjudicated on the merits in state court proceedings" – Issues 1; 2 (due process as pertains to Diane Staeffler); 3 (due process and Sixth Amendment); 4 (ex post facto and 8th Amendment); 5; 6(A) through (D); 7; 8; 9(A) (Sixth Amendment claim); 9(C) (Sixth Amendment claim); 9(D) Sixth Amendment claim); 9(E) (Sixth Amendment claim); 9(F) (Sixth Amendment claim); 9(G) (Sixth Amendment claim); and 11 – because (1) the state court decision was not contrary to, nor did it involve an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, and (2) the state court decision was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. *Ramdass v. Angelone*, 530 U.S. ___, 147 L.Ed.2d 125, 135-36, 120 S.Ct. ___ (2000); *Williams v. Taylor*, 529 U.S. ___, ___, 146 L.Ed.2d 389, 120 S.Ct. 1495 (2000); *Lindh v. Murray*, 521 U.S. 320, 334 n.7, 117 S.Ct.

2059, 2067 n.7, 138 L.Ed.2d 481 (1997); *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1998); *Hall v. Washington*, 106 F.3d 742, 748-49 (7th Cir. 1997); *Nevers v. Killinger*, 169 F.3d 352, 362 (6th Cir. 1999).

In the instant case, Petitioner has made no allegation, nor could he, that the state court adjudication, on the merits, involved an unreasonable application of federal law as determined by the United States Supreme Court.

Therefore, the above raised grounds must fail and should be dismissed.

CONCLUSION

Based on the above arguments and authorities Respondents request that the Petition for habeas corpus be denied and the application dismissed in it [sic] entirety.

Dated this 18th day of January, 2001.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CHARLES RUSSELL RHINES Petitioner, v. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	Civ. No. 00-5020-KES SECOND AMENDED PROCEDURAL ORDER (Filed Feb. 20, 2001)

On February 16, 2001, Petitioner filed "Motion for Extension of Time to File Traverse." The court has reviewed the motion, and it is hereby

ORDERED that Petitioner shall have until April 17, 2001, to file a Traverse. The Traverse shall be a comprehensive responsive pleading which addresses issues of exhaustion and procedural default, and shall present alternative arguments of cause and prejudice or a fundamental miscarriage of justice, when applicable. Requests for an evidentiary hearing regarding cause and prejudice, or miscarriage of justice, shall be incorporated in to Petitioner's Traverse.

IT IS FURTHER ORDERED that if Respondent files a Reply, it shall be done no later than **May 17, 2001**, after the Traverse is filed.

IT IS FURTHER ORDERED that if Petitioner files a Sur-reply, he shall do so no later than **May 31, 2001**, after the Reply is filed. *The Sur-reply shall be limited to*

arguments concerning cause and prejudice or a fundamental miscarriage of justice.

IT IS FURTHER ORDERED that after the procedural status of the claims raised in the Amended Petition are fully briefed, the court will determine which claims will be reviewed on the merits. A scheduling order will be issued that will set forth when Petitioner shall file a Memorandum of Law Re: Merits of Claims, when Respondents shall file a Response Re: Merits of Claims, and when Petitioner shall file a Reply. Requests for an evidentiary hearing shall be incorporated into Petitioner's Memorandum of Law. The Petition will then be in a posture for the court to resolve the merits of the appropriate claims in this habeas corpus proceeding.

Dated February 20, 2001.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

* *

CHARLES RUSSELL RHINES,

Plaintiff,

vs.

DOUGLAS WEBER, Warden, South Dakota State Penitentiary,

Defendant.

CIV. NO. 00-5020-KES

PETITIONER'S PARTIAL TRAVERSE TO STATE'S RESPONSE AND MOTION TO DISMISS

(Filed Apr. 17, 2001)

* *

Petitioner Charles Russell Rhines hereby files this Partial Traverse consistent with the Court's Procedural Orders and to traverse the State's Response to Procedural Order and First Motion to Dismiss.

I. PRELIMINARY STATEMENT

A. Scope of the Traverse Filing.

The Court in its Second Amended Procedural Order set the scope of this Traverse filing as follows:

> The Traverse shall be a comprehensive responsive pleading which addresses issues of exhaustion and procedural default, and shall present alternative arguments of cause and prejudice or a fundamental miscarriage of justice, when applicable. Requests for an evidentiary hearing regarding cause and prejudice, or miscarriage of

justice, shall be incorporated into Petitioner's Traverse.

Second Amended Procedural Order dated February 20, 2000; see also *Amended Procedural Order* dated October 18, 2000 and *Procedural Order* dated May 17, 2000.

The procedural orders of the Court also state:

> IT IS FURTHER ORDERED that after the procedural status of the claims raised in the Amended Petition are fully briefed, the court will determine which claims will be reviewed on the merits. A scheduling order will be issued that will set forth when Petitioner shall file a Memorandum of Law Re: Merits of Claims, when Respondents file a Response Re: Merits of Claims, and when Petitioner shall file a Reply.

Second Amended Procedural Order dated February 20, 2001; see also *Amended Procedural Order* dated October 18, 2000; *Procedural Order* dated May 17, 2000.

The procedural orders make clear that the Court contemplates that the Traverse address issues of exhaustion and procedural default. The State has raised issues of exhaustion and procedural default in the State's Response to Procedural Order and Motion to Dismiss through its "First Motion to Dismiss." Consistent with the Court's procedural orders, this Traverse focuses upon the first Motion to Dismiss of the State.

The State also included in its Response to Procedural Order and Motion to Dismiss a "Second Motion to Dismiss" and "Third Motion to Dismiss." The State's Second Motion to Dismiss seeks dismissal of ground ten of the First Amended Petition For Writ of Habeas Corpus, and argues that ground ten does not raise a federal question. The

Second Motion to Dismiss does not raise an argument about exhaustion or procedural default, but rather an argument that regards the merit of ground ten and whether it can provide a basis for relief. Accordingly, Petitioner does not address the Second Motion to Dismiss in this Traverse, but would intend to address and refute the State's argument in its Memorandum of Law Re: Merits of Claims.

Likewise, the Third Motion to Dismiss of the State seeks dismissal of various claims in the First Amended Petition For Writ of Habeas Corpus not based on exhaustion and procedural default, but based on the State's argument that certain claims were "adjudicated on the merits in state court proceedings" and, according to the State, therefore do not provide grounds for habeas corpus relief. The State's Third Motion to Dismiss accordingly will be addressed in the Memorandum of Law Re: Merits of Claims, rather than in this Traverse.

If the Court would prefer the Second Motion to Dismiss and Third Motion to Dismiss to be addressed prior to or separate from the Memorandum of Law Re: Merits of Claims, then Petitioner would request that the Court enter a Third Amended Procedural Order. For the sake of preservation of the record, Petitioner objects to and resists the State's Second Motion to Dismiss and the State's Third Motion to Dismiss. However, consistent with the contemplation and procedural orders of the Court, Petitioner focuses his Traverse on issues of exhaustion and procedural default raised by the State in its first Motion to Dismiss.

B. System of Reference and Citation.

Both Petitioner in his First Amended Petition for Writ of Habeas Corpus and this Traverse and the State in its Response to Procedural Order and Motion to Dismiss employ the following citation system:

"SR" followed by page number = Settled Record from Petitioner's criminal case, Pennington County Criminal File No. 93-81.

"TT" followed by page number = Trial Transcript in Pennington County Criminal File No. 93-81.

"HCT" followed by page number = Habeas Corpus Transcript from Pennington County Civil. File No. 96-1070.

In the State's Response to Procedural Order and Motion to Dismiss, the State stated that it has provided the Court with a copy of the South Dakota Supreme Court file associated with *State v. Rhines,* 548 N.W.2d 415 (S.D. 1996), *cert. denied, Rhines v. South Dakota,* 519 U.S. 1013 (1996), and one copy of the South Dakota Supreme Court file for *Rhines v. Weber,* 608 N.W.2d 303 (S.D. 2000), inclusive of briefs submitted in those two cases. Accordingly, Petitioner has not submitted another copy of briefing to the South Dakota Supreme Court. Petitioner, in addressing arguments of exhaustion and procedural default, cites to those briefs by identifying them by name, date, and cited page. If the Court has not received those briefs or desires Petitioner to file another copy of those briefs, Petitioner would request that the Court issue an order to that effect.

II. EXHAUSTION OF GROUNDS IN FIRST AMENDED PETITION

A. Exhaustion Standard.

The exhaustion requirement is codified at 28 U.S.C. § 2254(b). This provision states:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

28 U.S.C. § 2254(b).

Perhaps the leading case in interpreting the exhaustion requirement is *Picard v. Connor,* 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). In *Picard,* the Court considered whether the exhaustion requirement had been satisfied when a vague equal protection claim was asserted for the first time before the United States Supreme Court. *Id.* at 274 n.7 and 276, 92 S.Ct. at 511 n.7 and 513. The Court concluded that such an equal protection claim had not been exhausted because Petitioner previously had adverted to the Fourteenth Amendment only with reference to the challenge to the grand jury indictment. *Id.* at 277, 92 S.Ct. at 513. In discussing the exhaustion requirement, the Court in *Picard* reasoned:

> . . . Once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied. . . . Only if the state courts have had the first opportunity to hear the

> claims sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts.

Id. at 275-276, 92 S.Ct. at 512. The Court cautioned however:

> Hence, we do not imply that respondent could have raised the equal protection claim only by citing "book and verse of the federal Constitution." We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts.

Id. at 277-78, 92 S.Ct. at 513 (citations omitted).

In subsequent cases, the Supreme Court has made clear that the purpose of the exhaustion doctrine is "to afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary." *Vasquez v. Hillery,* 474 U.S. 254, 257, 106 S.Ct. 617, 620, 88 L.Ed.2d 598 (1986). The Supreme Court has also stated: "The purpose of exhaustion is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court" *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 10, 112 S.Ct. 1715, 1720, 118 L.Ed. 2d 318 (1992). The Supreme Court has acknowledged that a petitioner can exhaust a claim either by direct appeal of a conviction or through a state habeas petition, and that the failure of the state court to directly address a constitutional claim does not mean that the claim is not exhausted. *Castille v. Peoples,* 489 U.S. 346, 350-51, 109 S.Ct. 1056, 1059-60, 103 L.Ed.2d 380 (1989).

On several occasions, the United States Court of Appeals for the Eighth Circuit has discussed what a prisoner must do to satisfy the exhaustion requirement. In *Graham v. Solem,* 728 F.2d 1533 (8th Cir. 1984), *cert. denied,* 469 U.S. 842, the Eighth Circuit stated:

> Citation to a provision of the federal Constitution or a case addressing the constitutional basis of a claim, or a discernible reference to a federal constitutional right is all that is normally required.

Id. at 1535-36, *citing Anderson v. Harless,* 459 U.S. 4, 103 S.Ct. 276, 277-78 & n.3, 74 L.Ed.2d 3 (1982). That is, a petitioner may satisfy the exhaustion requirement by reference to either "a federal constitutional case, or a state case raising a pertinent federal constitutional issue" in proceedings in state court. *Kelly v. Trickey*, 844 F.2d 557, 558 (8th Cir. 1988).

The exhaustion requirement does not mandate that a petitioner "precisely articulate the issue in the state court, as long as the factual and legal basis of the claim is presented in the same manner to the state court. *Hill v. Lockhart,* 28 F.3d 832, 835 (8th Cir. 1994), *cent denied,* 513 U.S. 1102. A vague reference to "denial of fair trial" without mention of a constitutional provision or right may not provide a state court with a fair and meaningful opportunity to evaluate a claim. *Thomas v. Wyrick*, 622 F.2d 411, 412-13 (8th Cir. 1980). However, even an "abstract and conclusory" brief citing state cases can provide a state court with a fair and meaningful opportunity to consider the federal claim. *Morrow v. Wyrick,* 646 F.2d 1229, 1232 (8th Cir. 1981), *cert. denied,* 454 U.S. 899.

In sum, satisfaction of the exhaustion requirement of § 2254(b) is achieved by: "Citation to a provision of the federal Constitution *or* a case [whether federal or state] addressing the constitutional basis of the claim, *or* a discernible reference to a federal constitutional right." *Graham v. Solem,* 728 F.2d 1533, 1535 (8th Cir. 1984), *cert. denied,* 469 U.S. 842 (emphasis and bracketed supplied); *see also Kelly v. Trickey,* 844 F.2d 557, 558 (8th Cir. 1988) (support for bracketed material).

B. Analysis of Grounds in First Amended Petition.

The First Amended Petition for Writ of Habeas Corpus raised thirteen grounds for relief, some of which included subparts. With respect to each of the grounds, Petitioner included a Statement of Exhaustion. The State's First Motion to Dismiss challenges in part or in full eight grounds as not being exhausted and being procedurally defaulted. Each of Petitioner's thirteen grounds and issues as to exhaustion or absence of exhaustion are discussed separately below.

1. *Ground One:*

> *The Fifth and Fourteenth Amendment Rights of Mr. Rhines were infringed through admission and use at trial of Mr. Rhines' statements to law enforcement officers on June 19 and 21, 1992.*

The State in its first Motion to Dismiss does not challenge whether Ground One has been exhausted.

2. *Ground Two:*

> *The rights of Mr. Rhines to due process, an impartial jury, and to equal protection of the law were violated by exclusion for cause of two prospective jurors: A) Diane Staeffler; and B) Jack Meyer.*

The State in its Motion to Dismiss asserts that the equal protection claim as to exclusion of Diane Staeffler for cause is not exhausted and that all claims as to Jack Meyer being excused for cause are not exhausted.

A. Diane Staeffler.

The State appropriately does not challenge that claims of violation of Mr. Rhines' rights to due process and impartial jury indeed have been exhausted with respect to the exclusion for cause of juror Diane Staeffler. On direct appeal, the exclusion of Diane Staeffler for cause was raised by Mr. Rhines. *See Appellant's Brief* dated June 23, 1994, at pp. 28-41. On direct appeal, on the issue of exclusion of Diane Staeffler for cause, Petitioner cited directly to *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). *Appellant's Brief* dated June 23, 1994 at pp. 29, 40, 41. Petitioner also cited to the cases of *Davis v. Georgia,* 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976); and *Gray v. Mississippi,* 41 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987).

The State seeks dismissal of the equal protection challenge (based on the Fourteenth Amendment to the United States Constitution) of Ground 2A, while acknowledging that Petitioner's due process claim and claim of violation of the Sixth Amendment to Impartial Jury Claims are indeed exhausted by Rhines. The equal protection and due process provisions of the Fourteenth Amendment provide the vehicle by which the due process protection of the Fifth Amendment and the right to impartial jury of the Sixth Amendment are made applicable to

the states. *Pointer v. State of Texas,* 380 U.S. 400, 401-403, 85 S.Ct. 1065, 1066-67 (1965); *Malloy v. Hogan*, 378 U.S. 1, 6-7, 84 S.Ct. 1489, 1492-93, 12 L.Ed.2d 653 (1964) (Fifth Amendment guarantee against self-incrimination made applicable to states by Fourteenth Amendment); *Gideon v. Wainwright,* 372 U.S. 335, 341-343, 83 S.Ct. 792, 795-96, 9 L.Ed.2d 799 (1963) (Fourteenth Amendment makes the Sixth Amendment's guarantee of right to counsel applicable to States; *Mapp v. Ohio*, 367 U.S. 643, 656-57, 81 S.Ct. 1684, 1692, 6 L.Ed.2d 1081 (1961).

Indeed, the United States Supreme Court cases cited by Mr. Rhines in his direct appeal recognize that the Fourteenth Amendment is implicated by exclusion of jurors for cause based on their expression of scruples against infliction of the death penalty. In *Witherspoon,* the United States Supreme Court reversed imposition of the death penalty when potential jury members were eliminated for cause because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its imposition. The Supreme Court in *Witherspoon* reasoned:

> But it is self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and *Fourteenth* Amendments.

Witherspoon, 391 U.S. at 518, 88 S.Ct. at 1775 (emphasis supplied).

Likewise, in the *Gray* case, the United States Supreme Court reversed a conviction where a juror was improperly excluded for cause after being initially equivocal [sic] **and** ultimately stating that she could consider the

death penalty in an appropriate case. In applying the *Witherspoon* rationale to reverse the conviction, the United States Supreme Court in *Gray* recognized:

> In *Witherspoon,* this Court held that a capital defendant's right, under the Sixth and Fourteenth Amendments, to an impartial jury prohibited the exclusion of veneer [sic] members "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction".

Gray, 41 U.S. at 658, 107 S.Ct. at 2051. The Supreme Court in *Gray* further stated:

> It is necessary, however, to keep in mind the significance of a capital defendant's right to a fair and impartial jury under the Sixth and Fourteenth Amendments.

Gray, 41 U.S. at 658, 107 S.Ct. at 2051; *see also Id.*, 41 at 663, 107 S.Ct. at 2054 (again citing Sixth and Fourteenth Amendment constitutional rights).

The South Dakota Supreme Court, in the direct appeal in *State v. Rhines,* 548 N.W.2d 415 (S.D. 1996), recognized that the Fourteenth Amendment was implicated in Rhines' challenge to the exclusion of Diane Staeffler for cause. Part of the Court's opinion on the issue read as follows:

> Both the United States and South Dakota Constitutions guarantee trial by an impartial jury. *State v. Hansen,* 407 N.W.2d 217, 220 (S.D. 1987) (citing U.S. Const. Amend. VI; S.D. Const. Art. VI, 7; SDCL 23A-16-3); *Morgan v. Illinois,* 504 U.S. 719, 728, 112 S.Ct. 2222, 2229, 119 L.Ed.2d 492, 502 (1992) (holding the Sixth and *Fourteenth* Amendments to the United States

Constitution require "the impartiality of any jury that will undertake capital sentencing") . . . In *Witherspoon,* the Court held: "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522, 88 S.Ct. at 1777, 20 L.Ed.2d at 784-85. The Court reasoned that executing a death sentence returned by such a jury deprives the defendant of his life without due process of law and infringes his right to trial by an impartial jury under the Sixth and Fourteenth Amendments. 391 U.S. at 518, 88 S.Ct. at 1775, 20 L.Ed.2d at 783.

State v. Rhines, 548 N.W.2d 415, 430 (S.D. 1996).

A Petitioner such as Rhines may exhaust a claim by reference to either "a federal constitutional case, or a state case raising a pertinent federal constitutional issue" in proceedings in state court. *Kelly v. Trickey,* 844 F.2d 557, 558 (8th Cir. 1988). In this matter, Rhines cited to two United States Supreme Court cases that explicitly include the Fourteenth Amendment among the constitutional protections against a jury predisposed toward a verdict of death. The South Dakota Supreme Court indeed recognized the Fourteenth Amendment as one of the grounds insuring to Rhines the right to trial by an impartial jury in a death case, while discussing the *Witherspoon* decision, one of the decisions cited by Petitioner to the court. *State v. Rhines,* 458 N.W.2d 415, 430 (S.D. 1996). After all, it is the Fourteenth Amendment that makes the Fifth and Sixth Amendment protections apply in state court. Under these circumstances, the state has no legitimate grounds

to assert that a challenge based on the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution has not been exhausted with respect to the challenge to the exclusion for cause of Diane Staeffler.

B. <u>Jack Meyer.</u>

In the First Amended Petition For Writ of Habeas Corpus, Petitioner, in his Statement of Exhaustion, acknowledged: "The handling of juror Jack Meyer has not been separately exhausted in state court".

3. *Ground Three:*

The rights of Mr. Rhines to due process, an impartial jury, and equal protection of the law were violated by the State's calculated and selective use of peremptory challenges to exclude jurors with scruples or reservations about imposition of the death penalty.

The State in its First Motion to Dismiss asserted that the equal protection, Fifth and Eighth Amendment challenges set forth by this ground were not exhausted. The State raised no challenge to exhaustion of the claim of an impartial jury under the Sixth Amendment. Indeed, Petitioner raised in his direct appeal a challenge to the State's calculated and selective use of peremptory challenges, including citation to the cornerstone case of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). *Appellant's Brief* dated June 23, 1994, at 41-45.

Initially, Petitioner acknowledges that he raises no Eighth Amendment challenge as a part of Ground Three. The initial articulation of Ground Three in the First Amended Petition for Writ of Habeas Corpus does not

itself contain reference to the Eighth Amendment. The "supporting facts" section does reference the Eighth Amendment, as a consequence of inartful editing.

The Fourteenth Amendment protections of due process and equal protection, however, are implicated by the State's calculated and selective use of preemptory challenges to exclude jurors with scruples or reservations about imposing the death penalty. As stated in Part II.B.2. above, the *Witherspoon* case based a reversal of a conviction in Illinois State court on a violation of not only the Sixth Amendment but also the Fourteenth Amendment when prospective jury members were eliminated for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. *Witherspoon,* 391 U.S. 490, 519, 88 S.Ct. 1770, 1775, 20 L.Ed.2d 776 (1968). The South Dakota Supreme Court recognized that both the Sixth and Fourteenth Amendments were implicated by Rhines' cite to *Witherspoon* and challenge to the partiality of the jury. *State v. Rhines,* 548 N.W.2d 415, 430 (S.D. 1996).

Indeed, it is through the Fourteenth Amendment that constitutional protections contained in certain provisions of the Bill of Rights, such as the Fifth and Sixth Amendments, are safeguarded to state criminal defendants. *Pointer v. State of Texas,* 380 U.S. 400, 401-403, 85 S.Ct. 1065, 1066-67 (1965); *Malloy v. Hogan,* 378 U.S. 1, 6-7, 84 S.Ct. 1489, 1492-93, 12 L.Ed.2d 653 (1964) (Fifth Amendment guarantee against self-incrimination made applicable to states by Fourteenth Amendment); *Gideon v. Wainwright,* 372 U.S. 335, 341-343, 83 S.Ct. 792, 795-96, 9 L.Ed.2d 799 (1963) (Fourteenth Amendment makes the Sixth Amendment's guarantee of right to counsel applicable

to States; *Mapp v. Ohio,* 367 U.S. 643, 656-57, 81 S.Ct. 1684, 1692, 6 L.Ed.2d 1081 (1961).

In Ground Three, it is Petitioner's intention to challenge the State's calculated and selective use of peremptory challenges to exclude jurors who had with imposing the death penalty, based on the Sixth Amendment guarantee to an impartial jury as secured by the Fourteenth Amendment guarantees of due process and equal protection. If the verbiage used in Ground Three leads the Court to a concern about a mixed Petition, then Petitioner asks for leave to file a Second Amended Petition for purposes of clarifying Ground Three.

4. *Ground Four:*

> *Mr. Rhines' constitutional protection against ex post facto laws, the Eighth Amendment Right against cruel and unusual punishment, and rights to due process and equal protection of law were violated by use of victim impact testimony during the penalty phase.*

The State's First Motion to Dismiss challenges exhaustion of the claims in Ground Four to equal protection and due process. The State's First Motion to Dismiss does not challenge exhaustion of the claim of violation of the ex post facto protection of the United States Constitution or the Eighth Amendment of the United States Constitution.

Petitioner in Ground Four refers to the due process and equal protection rights of the Fourteenth Amendment, in that it is the Fourteenth Amendment that makes the Eighth Amendment protection against cruel and unusual punishment applicable to a state court defendant.

Petitioner, in his Brief on direct appeal as a part of his argument regarding the victim impact statement, cited the case of *Booth v. Maryland,* 42 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). *Appellant's Brief* dated June 23, 1994 at 55. The South Dakota Supreme Court also cited to the *Booth* case in its opinion. *State v. Rhines,* 548 N.W.2d 415 (S.D. 1996). The *Booth* case, which focuses upon the application of the Eighth Amendment to victim impact statements, states as follows:

> The prohibitions of the Eighth Amendment apply to the States' through the Due Process Clause of the Fourteenth Amendment. *See Robinson v. California,* 370 U.S. 660, 666, 82 S.Ct. 1417, 1420, 8 L.Ed.2d 758, (1962).

Booth, 482 U.S. 496, 500 N.5, 107 S.Ct. 2529, 2532 N.5.

It is sufficient to exhaust claims that Petitioner cite to a provision of the Federal Constitution, *or* to a case addressing the constitutional basis to the claim, or make a discernable reference to a federal constitutional right *Graham v. Solum,* 728 F.2d 1533, 1535-36 (8th Cir. 1984), *cert. denied,* 469 U.S. 842. The purpose is not to erect an artificial procedural hurdle on the path to the federal habeas court. *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 10, 112 S.Ct. 1715, 1720, 118 L.Ed.2d 318 (1992). In this circumstance, Petitioner cited to a federal constitutional case raising the pertinent constitutional issue and referring to the well-established principle that the Fourteenth Amendment extended to states application and protection of certain of the Bill of Rights. That is enough to satisfy the exhaustion requirement of Section 2254. *See Kelly v. Trickey,* 844 F.2d 557, 558 (8th Cir. 1988).

5. *Ground Five:*

The due process, equal protection and Eighth Amendment Rights of Mr. Rhines to be free from cruel and unusual punishment were infringed through imposition of the death penalty by a jury that considered an unconstitutional "depravity of mind" an aggravating factor.

The State does not challenge in its first Motion to Dismiss the fact that this claim has been exhausted procedurally.

6. *Ground Six:*

Mr. Rhines' rights to due process, equal protection and to be free from cruel and unusual punishment were violated on account of the unconstitutionality of the South Dakota Capital Punishment statutes in several respects.

Ground Six contains five subparts labeled A through E. The State in its first Motion to Dismiss challenges only Ground 6.E. as not having been procedurally exhausted. In the first Amended Petition For Writ of Habeas Corpus, Petitioner acknowledges in the Statement of Exhaustion section of Ground Six: "Issue 6.E. was not directly raised previously by Rhines, but is futile to pursue in State Court in light of the South Dakota Supreme Court Ruling in *State. v. Moeller,* 616 N.W.2d 424, 463 (S.D. 2000)"

7. *Ground Seven:*

The Fifth Amendment Right to due process, the Eighth Amendment Rights to be free from cruel and unusual punishment and the Equal Protection Rights of Mr. Rhines were violated by improper jury instructions during the penalty phase.

The State in its first Motion to Dismiss does not challenge the fact of exhaustion of Ground Seven.

8. *Ground Eight:*

There was constitutionally insufficient evidence to support a finding of certain aggravating circumstances.

The State in its first Motion to Dismiss does not challenge the fact of exhaustion of Ground Eight.

9. *Ground Nine:*

Mr. Rhines' Fifth Amendment Right to due process of law and the Sixth Amendment Right to assistance of counsel were violated through the ineffective assistance of his trial counsel.

The State does not challenge the fact that Ground 9, subparts A, C, D, E, F, and G have been exhausted. The State limits its challenge to exhaustion in the first Motion to Dismiss to Ground 9 subparts B, H, I, and J.

Ground B relates to the tepid presentation of evidence during the penalty phase by the attorneys for Mr. Rhines, referring to the failure to contact or call available witnesses – including, but not limited to, John Fousek, James Mighell and Connie Royer – who would have provided helpful testimony for Mr. Rhines in the penalty phase. Ground 9.B. is the functional equivalent of Ground 1.I. raised by Mr. Rhines in his habeas corpus case and appeal. Indeed, the tepid presentation of evidence during the penalty phase by the attorneys for Mr. Rhines was the subject of Rhines' state habeas corpus grounds I.B., F., and I., and indirectly ground I.A. as well. Petitioner presented each of these grounds to the South Dakota Supreme Court

on appeal in the habeas corpus case. *Appellant's Brief* dated December 10, 1998, at 9, 17-37.

In Rhines' argument on appeal in the State Habeas Corpus case, the Appellant's Brief contains direct and repeated reference to "ineffective assistance of counsel" and cites the seminal case of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In raising a challenge of ineffective assistance of counsel based on the absence of work focused on the penalty phase, the Appellant's Brief in the habeas corpus case includes the following discussion:

> Charles Russell Rhines' counsel failed to investigate his background for mitigation evidence . . . The issue in this case was whether a death sentence would be imposed. Therefore, attention should have been given to the collection of mitigation evidence. That is evidence to be presented at the penalty phase of trial, to show why Charles Russell Rhines should live. . . . The billing records for Charles Russell Rhines' attorneys showed that only a cursory amount of work was devoted to mitigation witnesses . . . Besides background work, other things were not done by the attorneys in this case. These have been discussed before, but tie into the claim that no mitigation work was done. . . . At the deposition of Michael Butler, the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, were put into evidence. Most of Michael Butler's testimony as to what should have been done in mitigation, was based on what these guidelines recommend.

Appellant's Brief dated December 10, 1998 at 34-35 (citations omitted). The Appellant's Brief then quotes from the

American Bar Association Guidelines for the appointment and performance of counsel in death penalty cases, which includes in guideline 11.8.6 the following:

> a. Counsel should present to the sentencing entity or entities all reasonable available evidence in mitigation unless there is strong strategic reasons to forego some portion of such evidence.
>
> c. Counsel should consider all potential methods of offering mitigating evidence to the sentencing entity or entities, including witnesses, Affidavits, reports . . . letters and public records.

The Appellant's Brief in the State habeas corpus case concludes one section with the following presentation:

> In spite of the above concerns, very little attempt was made to put in other information contained in the guidelines. . . . In conclusion, in this case, things were not done and not attempted to be done. . . . An effective attorney should have done these things. They were not done. Therefore, Charles Russell Rhines asks that this Court find there was ineffective assistance of counsel.

Habeas Corpus Brief dated December 10, 1998 at 37.

The State probably will assert that Ground 9.B. is not exhausted because Ground 9.B. is expressed differently than how this issue was argued on appeal of the State habeas corpus case. If this indeed is the argument of the State, the State is taking a far too technical view of the exhaustion requirement. The purpose of exhaustion is not creation of procedural hurdles, but simply to afford first to the State a meaningful opportunity to consider allegations of legal error. *Vasquez v. Hillary,* 474 U.S. 254, 257, 106

S.Ct. 617, 620, 88 L.Ed.2d 598 (1986). In *Vasquez,* the United States Supreme Court held that presentation of additional facts to the District Court did not evade the exhaustion requirement, when the prisoner had presented the substance of the claim previously to state courts. *Vasquez,* 474 U.S. at 257-58, 106 S.Ct. at 620.[1]

The United States Supreme Court in *Sanders v. United States,* 373 U.S. 1, 83 S.Ct. 1068 (1963), discussed when in the habeas context grounds in a Petition are functionally the same. In *Sanders,* the Supreme Court reasoned as follows:

> But a claim of involuntary confession predicated on alleged psychological coercion does not raise a different "ground" than does one predicated on alleged physical coercion. In other words, identical grounds may often be proved by different factual allegations. So also, identical grounds may often be supported by different legal arguments, or vary in material respects. Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant.

Sanders, 373 U.S. at 16, 83 S.Ct. at 1077 (citations omitted); *see also Picard v. Connor,* 404 U.S. 270, 277, 92 S.Ct.

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[1] In *Vasquez,* the District Court requested that the Respondent supplement and clarify the record by presenting additional information and data on African American service on grand juries in King County, California That information then led to grant of the Petition For Writ of Habeas Corpus. Notwithstanding the presentation of additional statistical and supplemental evidence, the Court in *Vasquez* concluded that the additional information "did not-fundamentally alter the legal claim already considered by the State Courts." *Vasquez,* 474 U.S. at 260, 106 S.Ct. at 622.

509, 513, 30 L.Ed.2d 438 (1971) (recognizing instances where ultimate question for disposition on habeas corpus case will be the same despite variations in the legal theory or factual allegations urged in its support); *see also Hill v. Lockhart,* 28 F.3d 832, 835 (8th Cir. 1994) *cert. denied,* 513 U.S. 1102. Accordingly, the fact that there may be some variance or greater precision in how petitioner is presenting the claim under Ground 9.B. is not fatal to its presentation. The substance of Ground 9.B. – addressing the ineffective assistance of counsel in doing utterly insufficient work to formulate an effective penalty phase presentation – has been exhausted.

The State in its First Motion to Dismiss challenges Ground 9 H, I, and J. In the Statement of Exhaustion to Ground 9, Petitioner indicated that the issues listed as A through G were explicitly raised in the habeas corpus proceeding. The matters listed as H, I, and J are elaborations on Ground 1.I. of the Habeas Corpus Petition. Ground H, I, and J are part of the same argument for ineffective assistance of counsel under the *Strickland* test, but represent variations and elaborations on factual information previously presented. As such, Ground 9 H, I, and J do not fundamentally alter the legal claim already considered by the State Court's on ineffective assistance of counsel and should not subject the First Amended Petition For Habeas Corpus to dismissal. *See Hill v. Lockhart,* 28 F.3d 832, 835 (8th Cir. 1994), *cert. denied,* 513 U.S. 1102.

10. *The rights of Mr. Rhines to due process, equal protection under law, and to be free from cruel and unusual punishment were violated by the Court's errors in proportionality review and review of whether imposition of the death penalty was under passion, prejudice or other factors.*

The State in its First Motion to Dismiss contends that Ground Ten was not exhausted, and in its Second Motion to Dismiss contends that there is no federal issue raised by Ground Ten. Because of the scope contemplated by the Court for this Traverse, only the First Motion to Dismiss is considered here.[2]

There is no question that the factual substance of Ground Ten was presented on direct appeal. Indeed, Petitioner addressed how application of the death penalty to him was disproportionate. *Appellant's Brief* dated June 23, 1994 at 117-122; *Appellant's Proportionately* [sic] *Review Brief* dated January 18, 1995 at pp. 3-21; *Appellant's Proportionality* [sic] *Review Reply Brief* dated March 3, 1999 at pp. 3-10. In Appellant's Brief, Rhines referred to the Eighth Amendment to the United States Constitution nine times with respect to discussing the handling of the death penalty imposition, and repeatedly referred to the Fourteenth Amendment to the United States Constitution in making such arguments. *Appellant's Brief* dated June 23, 1994 at pp. 45, 46, 49, 51, 79, 82, 111, 112, and 113.

Specifically with respect to proportionality review, Petitioner cited three cases that discuss proportionality in the context of the Eighth Amendment prohibition against cruel and unusual punishment. Petitioner first cited *State*

[2] Petitioner objects to the Second Motion to Dismiss, for reasons that the due process and equal protection provisions of the Fourteenth Amendment and the cruel and unusual punishment protection under the Eighth Amendment are implicated by errors in review of whether the death penalty is being applied proportionately in South Dakota. *See Penmen v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

v. Marshall, 613 A.2d 1059 (N.J. 1992). *Appellant's Brief* dated June 23, 1994 at 119-121; *Appellant's Proportionality Review Brief* at 4-6,10, 18.

As if the South Dakota Supreme Court could not appreciate the inherent Eighth Amendment issue of cruel and unusual punishment in doing an appropriate proportionality review, the citation to *State v. Marshall,* 613 A.2d 1059 (N.J. 1992) would alert the South Dakota Supreme Court to such an issue. In *State v. Marshall,* the New Jersey court cited essentially every recent seminal case from the United States Supreme Court discussing cruel and unusual punishment in the context of the death penalty. The *Marshall* case included in its discussion the following Eighth Amendment authority:

1. *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Eighth Amendment prohibition against cruel and unusual punishment invalidates Georgia death penalty statute);

2. *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (Eighth Amendment review of Texas death penalty statute);

3. *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (Eighth Amendment review of the Florida death penalty statute);

4. *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (Eighth Amendment review of the Georgia death penalty statute);

5. *Pulley v. Harris,* 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984);

6. *Stanford v. Kentucky,* 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (death penalty imposition on minors and Eighth Amendment ramifications);

7. *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (Eighth Amendment ramifications of death penalty imposition on mildly retarded);

8. *Coker v. Georgia,* 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977);

9. *Edmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982);

10. *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982);

11. *Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983);

12. *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978);

13. *McCleskey v. Kemp,* 41 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

State v. Marshall, 613 A.2d 1059, 1066-1108 (N.J. 1992).

Petitioner next cited the case of *Commonwealth v. Frey,* 475 A.2d 700 (Pa. 1984) in its briefing. *Appellant's Brief* dated June 23, 1994 at 120; *Appellant's Proportionality Review Brief* dated January 18, 1995 at 5. The *Frey* case likewise cited many of the same cases, including *Zant, Lockett, Gregg,* and *Jurek,*[3] among a couple of additional cases from the United States Supreme Court evaluating death sentences under the Eighth Amendment protection

[3] Full citations for these cases appear on pages 20 of this Traverse.

against cruel and unusual punishment. *Frey,* 475 A.2d at 704-710.

Finally, Petitioner cited *State v. Rupe,* 743 P.2d 210 (Wash. 1987), specifically referring the Court to page 229. *Appellant's Brief* dated June 23, 1994 at 120; *Appellant's Proportionality Review Brief* dated January 18, 1995 at 6. On page 229, the *Rupe* decision cites to three cases from the United States Supreme Court involving the Eighth Amendment and discussions of the prohibition against cruel and unusual punishment as it applies to imposition of the death penalty. The three United States Supreme Court cases cited on page 229 in the *Rupe* decision are *Pulley, Zant,* and *Lockett.*[4] *Rupe,* 743 P.2d at 229.

The United States Court of Appeals for the Eighth Circuit has recognized that a petitioner may satisfy the exhaustion requirement by reference to *either* "a federal constitutional case, or a state case raising a pertinent federal constitutional issue." *Kelly v. Trickey,* 844 F.2d 557, 558 (8th Cir, 1988). As if the South Dakota Supreme Court needed to be reminded of the implications of the Eighth Amendment in doing a proportionality review of the imposition of the death penalty, Petitioner discharged any responsibility to alert the Supreme Court as to the constitutional dimensions of his proportionality argument through the citations to *Marshall, Frey,* and *Rupe.*

11. *Ground Eleven:*

The Due Process Rights and Right to Adequate Assistance of Counsel of Rhines were violated by the refusal of the trial court to appoint a forensic communication expert.

[4] Full citations for these cases appear on page 20 of this Traverse.

The State in its first Motion to Dismiss does not challenge the fact that this ground has been exhausted.

12. *Ground Twelve:*

The due process and equal protection rights of Mr. Rhines were violated by various acts of prosecutorial misconduct.

The State challenges this ground in its First Motion to Dismiss. Petitioner in his First Amended Petition For Writ of Habeas Corpus recognized with respect to Ground Eleven that, other than the prosecution tactic of eliminating all jurors with scruples or misgivings about the death penalty, the other instances of prosecutorial misconduct had not previously been raised.

13. *Ground Thirteen:*

The Fifth, Sixth, and Fourteenth Amendment Rights of Mr. Rhines were violated as a result of the failure to have Mr. Rhines present or allow hint to participate in the handling of the jury note and response to the jury note.

The State challenges Ground Thirteen as not having been exhausted in its first Motion to Dismiss. In the First Amended Petition For Writ of Habeas Corpus, Petitioner recognized that, while issues surrounding the handling of the jury note had been raised on direct appeal and in the habeas corpus case, this precise claim had not previously been raised.

III. CAUSE AND PREJUDICE

A. Cause and Prejudice Standard.

The United States Supreme Court first articulated the "cause and prejudice" standard in *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). The United States Supreme court in *Wainwright* specifically stated: "We leave open for resolution and future decisions the precise definition of the 'cause' – and – 'prejudice' standard." *Id.* at 87, 97 S.Ct. at 2507.

Since the decision in *Wainwright,* the United States Supreme Court repeatedly has emphasized the need for flexibility in applying the "cause" prong of the cause and prejudice test. *Amadeo v. Zant,* 486 U.S. 214, 219, 108 S.Ct. 1771, 1775, 100 L.Ed.2d 249 (1988). In *Reed v. Ross,* 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984), the Court discussed the cause prong as follows:

> Because of the broad range of potential reasons for an attorney's failure to comply with a procedural rule, and the virtually limitless array of contexts in which a procedural default can occur, this Court has not given the term "cause" precise content. Nor do we attempt to do so here. Underlying the concept of abuse, however, is at least the dual notion that, absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel, and that defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct. A defense attorney, therefore, may not ignore a State's procedural rules in the expectation that his client's constitutional claims can be raised at a later date in Federal court. Similarly, he may not use the prospect of federal habeas corpus relief as a hedge against the strategic risks he takes in his client's defense in State court.
>
> * * *
>
> On the other hand, the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interest.

Reed, 468 U.S. at 13-14, 104 S.Ct. at 2909 (citations omitted); *see also Amadeo v. Zant,* 486 U.S. 214, 219, 108 S.Ct. 1771, 1775, 100 L.Ed.2d 249 (1988).

The "principal concerns" behind the cause and prejudice standard are to prevent sandbagging and deliberate bypass of state procedures. *Amadeo v. Zant,* 486 U.S. 214, 219, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988); *see also Reed v. Ross,* 468 U.S. 1, 13-14, 104 S.Ct. 2901, 2909, 82 L.Ed.2d 1, ___ (1984).

Ineffective assistance of counsel is cause justifying procedural default under the cause and prejudice standard. *Coleman v. Thompson,* 501 U.S. 722, 754, 111 S.Ct. 2546, 2567, 115 L.Ed.2d 640 (1991); *Murray v. Carrier,* 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986); *Dawan v. Lockhart,* 980 F.2d 470, 473 (8th Cir. 1992).

B. Motion For Additional Time.

As described in the separate Motion filed herewith, the United States Supreme Court has before it for decision a case that will affect whether and how Petitioner presents cause and prejudice arguments with respect to the unexhausted claims – Ground 2.B., Ground 6.E., Ground

12, and Ground 13. Petitioner requests that the court grant Petitioner an extension to brief cause and prejudice issues as sought in the separately filed Motion.

IV. CONCLUSION

For the reasons contained herein, Petitioner requests that the Court denied the State's First Motion to Dismiss and find all grounds raised in the First Amended Petition to be exhausted.

V. REQUEST FOR ORAL ARGUMENT

Petitioner requests oral argument under Local Rule 7.1 on all issues of exhaustion of claims.

Dated at Sioux Falls, South Dakota, this 16th day of April, 2001.

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	CIV. 00-5020-KES FINAL TRAVERSE (Filed Aug. 1, 2001)

Petitioner, Charles Russell Rhines, by and through his court-appointed attorneys, John A. Schlimgen and Roberto A. Lange, has received from the court its Order granting the Petitioner until July 23, 2001, to file its final traverse in this matter.

Petitioner has filed a traverse which covers almost all of the grounds raised in the Amended Petition for Habeas Corpus. Petitioner's position is that those grounds are, under applicable federal case law, exhausted.

There are four grounds raised in the Amended Petition for Habeas Corpus which are not exhausted under applicable case law at this time. Those grounds are 2B (exclusion of perspective juror, Jack Meyer); 6E (unconstitutionality of South Dakota capital statute and application); 12 (prosecutorial misconduct); and 13 (lack of presence of Petitioner at the time of the jury note and response was handled by the trial court).

Petitioner recognizes that the rule of *Rose v. Lundy*, 456 U.S. 953, 102 S.Ct. 2026, 72 L.Ed.2d 478 (1982) requires that a petition that contains both exhausted and unexhausted crimes be either dismissed, or the exhausted claims be excised from the petition. However, there are exceptions to this rule. In *Simmons v. Lockhart*, 915 F.2d 372 (8th Cir. 1990), the Eighth Circuit held that a mixed petition can be held in abeyance pending exhaustion. In *Simmons*, the issue was whether counsel's failure to file a State post conviction relief petition constituted sufficient cause for a petitioner's failure to raise a claim in State Court. The *Simmons* court held that it did constitute sufficient cause.

After Petitioner had filed his Amended Petition for Writ of Habeas Corpus, the South Dakota Supreme Court decided *Jackson v. Weber*, 2001 S.D. 30. In *Jackson*, the South Dakota Supreme Court recognized the right under South Dakota law to affective [sic] assistance of counsel during a habeas proceeding.

Although not phrased under the guise of ineffective assistance of counsel claims, all four of the unexhausted claims are in the status of being unexhausted solely for the reason that trial counsel failed to present them to any of the South Dakota courts. Under *Simmons*, this does constitute sufficient cause. Under *Jackson*, Petitioner has a form [sic] to hear the matter. Consequently, under *Simmons*, this court need not apply the rule of *Rose v. Lundy* in this case.

Dated this 23 day of July, 2001.

STUART, GERRY &
SCHLIMGEN, Prof. LLC

/s/ [Illegible]
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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES, Petitioner, v. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	CIV. NO. 00-5020-KES REPLY TO PETITIONER'S FINAL TRAVERSE (Filed Aug. 17, 2001)

The parties have filed several documents in this matter in accordance with the Court's procedural orders. It appears that the pleadings in this matter on file at this time include the following:

1. The first amended petition for writ of habeas corpus and statement of exhaustion, filed by Petitioner.

2. State's response to procedural order and motion to dismiss, filed by the Petitioner.

3. Petitioner's partial traverse to State's response and motion to dismiss, filed by the Petitioner.

4. State's reply to partial traverse, filed by the Respondent.

5. Petitioner's final traverse, dated July 23, 2001, and received by Respondent's counsel on July 25, 2001.

This document is intended as a reply to the Final Traverse, but also as a clarification of some of the earlier filings in light of case law developments in both

state and federal court. At this point, it would appear that the State has responded to both the initial habeas corpus petition (although the response was procedural in nature in accordance with the Court's orders) and to the partial traverse.

The prior filings of the parties make it clear that there is disagreement on the subject of which issues have been appropriately raised in the state courts. Petitioner contends that there are only four grounds that have not been so raised, including: (1) exclusion of prospective juror Jack Meyer, (2) unconstitutionality of South Dakota death penalty and its application, (3) prosecutorial misconduct, and (4) failure of Petitioner to be present at the time the jury note response was ruled upon. The State has identified additional issues, including: (1) an equal protection issue on prospective juror Diane Staeffler, (2) the State's use of peremptory challenges as equal protection, Fifth and Eighth Amendment claims; (3) equal protection argument on victim impact testimony; (4) ineffective assistance in the presentation of evidence at the penalty phase; (5) ineffective assistance grounds H (Glenn Wishard testimony), I (not hiring a "mitigation expert"), and J (allegedly irrelevant testimony about a gun and the victim's funeral); (6) proportionality review as a federal constitutional issue. These issues are all identified in the prior filings, but are repeated here only to place the matter in appropriate context.

In reply, the State would make several arguments as follows:

1. Respondent continues to contend that, in line with prior filings, the issues not raised in state court are procedurally defaulted, and, therefore, should be denied.

Petitioner can show no cause and prejudice for not raising them previously. As indicated, the case of *Coleman v. Thompson*, 501 U.S. 722 (1991) precludes a finding of cause and prejudice based on ineffective assistance of counsel during State habeas corpus proceedings. Therefore, if, in fact, these issues are procedurally defaulted, cause cannot arise from the alleged failings of Petitioner's habeas counsel. Since all these issues, at least theoretically, could have been raised in State habeas proceedings, no cause and prejudice from any ineffectiveness of state habeas counsel can arise.

2. In spite of the case of *Jackson v. Weber*, 2001 S.D. 30, 623 N.W.2d 71, reh'g granted, April 18, 2001, Petitioner's unraised issues are still procedurally defaulted. This is true for at least three reasons. First, since the rehearing has been granted, *Jackson* does not govern any proceedings until it is finally decided by the South Dakota Supreme Court. It has no precedential value before that. Second, in order for Petitioner to benefit in from *Jackson v. Weber*, he would need to be claiming ineffective assistance of his habeas counsel. Petitioner admits at page two of his Final Traverse, however that his issues are not "phrased under the guise of ineffective assistance of counsel." Therefore, those issues would not implicate ineffective assistance of counsel and could not lead to relief, even under *Jackson v. Weber*. Third, under previously cited case law, (*Ashker*; *Novaock*) it would be futile to return to state court.

3. Respondent has previously argued that the issues are exhausted, because they are procedurally defaulted. Petitioner argues, however, that a forum in State court remains because of the *Jackson* case. *Jackson* governs nothing at this time, since it is not final. Should the South

Dakota Supreme Court, however, decide that second or repeat petitions can be brought, and should it appear that the issues are unexhausted for that reason, the State *does not* waive the applicability of the exhaustion doctrine. We would preserve that issue, but only if it is found that the issues are not procedurally defaulted.

5. In all other respects, the State reasserts the matter contained in its two prior filings, State's Response to Procedural Order and Motion to Dismiss; and State's Reply to Partial Traverse.

6. Under *Duncan v. Walker*, 121 S.Ct. 2120, there is a price to be paid for failure to raise issues in State Court when the opportunity exists. The purpose of the statute of limitations under the AEDPA found at 28 U.S.C. § 2244(d) is to promote finality of State court criminal cases, as well as to promote comity and respect for the separate sovereignty of the states within the federal system. *Duncan*, 121 S.Ct. at 2127. By requiring full exhaustion, and at the same time strictly enforcing the one-year statute of limitations, there will be finality to state convictions to a much greater degree. The exhaustion requirement itself, according to *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982) will encourage state prisoners to seek full relief from the State courts. This will give state courts the opportunity to review all claims of constitutional error. The requirement is designed principally to protect the State courts' role in the enforcement of federal law and to prevent disruption of state judicial proceedings. The statute of limitations was interpreted in *Duncan*, 121 S.Ct. at 2129 as tolling the one-year requirement only when State Court proceedings are being pursued.

7. Plaintiff's premise in the "Final Traverse" is that the rule of *Rose v. Lundy*, 455 U.S. at 520 requiring either complete exhaustion, dismissal or waiver of unexhausted claims, need not be applied because of Eighth Circuit case law. Aside from the fact that United State Supreme Court case law obviously trumps Eighth circuit case law, the case Respondent cites, *Simmons v. Lockhart*, 915 F.2d 372 (8th Cir. 1990) was actually overruled by the later case of *Victor v. Hopkins*, 90 F.3d 276, 282 (8th Cir. 1996), *reh'g and suggestion for reh'g en banc denied*, October 1, 1996, *cert. denied*, 519 U.S. 1153 (1997). Petitioner claims that under *Simmons*, this court may hold a case in abeyance during state court exhaustion of remedies. This course of action, however, is *specifically* prohibited in *Victor*, 90 F.3d at 282: "Accordingly we hold that the district court has no authority to hold Victor's mixed petition in abeyance or to maintain the stay of execution. The choices stated in *Rose v. Lundy* are the only options available to a habeas petitioner." The Eighth Circuit explained its reason for so ruling, including its that the *Simmons* holding is contrary to the Supreme Court's explicit directions in *Rose*. It is also inconsistent with the Supreme Court's cases post *Rose*. *Victor*, 90 F.3d at 282. It is to be noted that *Victor*, like this case, was a death penalty case.

Under Eighth Circuit case law, this Court cannot hold the matter in abeyance. If Petitioner wishes to further exhaust State remedies, the matter must be dismissed in accordance with *Rose v. Lundy*. If Petitioner wishes to proceed on only exhausted claims, then he must so elect, and those not pursued would probably be regarded as waived.

8. Respondent realizes that *Victor v. Hopkins* was decided before applicability of the statute of limitations

discussed in *Duncan v. Walker*. Respondent also acknowledges that the concurrence and the dissent in *Duncan v. Walker* addressed concepts of equitable tolling, and of holding a case in abeyance in spite of *Rose v. Lundy*. The majority did not adopt the suggestions in the concurrence and dissent that cases can be held in abeyance or "equitably tolled." While those doctrines are not specifically addressed in the majority in *Duncan*, 121 S.Ct. at 2129, it is apparent from the language contained at 121 S.Ct. 2127-28 that the court would probably find that such tolling or holding in abeyance undermines the purposes of the statute of limitations.

Respondent recognizes that Petitioner faces a difficult choice at this point in the litigation. If he blames his state habeas attorney for not bringing up certain issues, it will not help him in federal court. This is because under *Coleman v. Thompson*, any ineffective assistance on state habeas cannot be cause to overcome a state court procedural default. If Petitioner, on the other hand, wishes to return to State court to exhaust and thus has his mixed petition dismissed, he may be unable to refile in federal court due to the statute of limitations as interpreted in *Duncan*. This choice, however, merely illustrates the fact that federal habeas law exacts a price when the petitioner fails to raise issues at the first opportunity in the state courts. Habeas, it has been observed, is a civil case, and the risk of bad attorney representation rests with the party being represented, not with the opposition. Petitioner's attorney is his agent, and he bears the risk of attorney error. *See Coleman*, 501 U.S. at 752-53. While Respondent does not acknowledge that representation on State habeas was ineffective, Petitioner is entitled to no relief in federal court even if it was. *Id.* Petitioner still may assert defaulted claims in federal court if there is cause

and prejudice or if he were able to show that he is actually innocent of the crime. It appears that Petitioner may not be able to assert in federal court claims that were not raised for the first time in State court. This is not unjust. It is the natural, logical, and inevitable consequence of requiring both that Petitioner raise his issues for the first time in State court and that he bring any issues to federal court within one year after State conviction, less the time necessary to pursue State remedies.

CONCLUSION

The State hereby requests that it be granted dismissal in accordance with its initial filing in this matter, or, in the alternative, that this matter be dismissed without prejudice if it is found to contain unexhausted claims. Respondent also requests that all procedurally defaulted claims be dismissed on the merits and with prejudice.

Dated this 16th day of August, 2001.

Respectfully submitted,

MARK BARNETT
ATTORNEY GENERAL

/s/ Craig M. Eichstadt
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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES, Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	)	Civ. 00-5020-KES ORDER (Filed Dec. 11, 2001)

Respondent moves for an extension of time to file his brief. Petitioner has no objection. Good cause appearing, it is hereby

ORDERED that respondent shall file his brief by December 13, 2001.

Dated December 11, 2001.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	)	Civ. 00-5020-KES ORDER (Filed Jul. 03, 2002)

Petitioner, Charles Rhines, filed a petition for writ of habeas corpus alleging thirteen general grounds for relief. Douglas Weber, respondent, alleges that several of the grounds raised by petitioner have not been exhausted and are, therefore, procedurally defaulted and must not be considered by this court.

FACTS

Petitioner was convicted of premeditated first-degree murder and third-degree burglary. On January 26, 1993, a jury sentenced him to death by lethal injection, and the judgment was entered on January 29, 1993. Petitioner appealed his conviction and sentence to the South Dakota Supreme Court. Fourteen issues were raised during his direct appeal, including the excuse of prospective juror Diane Staeffler, the state's use of their peremptory challenges, the use of victim impact testimony, and the proportionality review. The South Dakota Supreme Court affirmed petitioner's conviction and sentence and the United States Supreme Court denied further review on

December 2, 1996. Petitioner then filed an application for writ of habeas corpus in state court on December 5, 1996. In his state habeas, petitioner raised numerous issues, including ineffective assistance of counsel, excusing prospective juror Diane Staeffler, and the constitutionality of the South Dakota capital punishment statutes. His habeas was denied by the trial court on October 8, 1998. The South Dakota Supreme Court denied his appeal on February 9, 2000. On February 22, 2000, petitioner filed this application for writ of habeas corpus in federal court.

DISCUSSION

A. Exhaustion

Before a claim for relief in a habeas petition may be considered by this court, the petitioner must have exhausted his state remedies. "[T]he state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *O'Sullivan v. Boerckel,* 526 U.S. 838, 842 (1999). A claim is not exhausted unless the same factual arguments and legal theories are presented in both the state and federal claims. *See Kenley v. Armontrout,* 937 F.2d 1298, 1302 (8th Cir. 1991). "This means that the federal claim should not present significant additional facts such that the claim was not fairly presented to the state court." *Id.* (citing *Stranghoener v. Black,* 720 F.2d 1005, 1007-08 (8th Cir. 1983)).

The Eighth Circuit Court of Appeals has determined that a petitioner has fairly presented a federal claim to the state courts if he refers to "'a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent

federal constitutional issue' in a claim before the state courts." *Kelly v. Trickey,* 844 F.2d 557, 558 (8th Cir. 1988) (quoting *Thomas v. Wyrick,* 622 F.2d 411 (8th Cir. 1980)). Thus, we must examine the contested grounds of relief to determine if the same factual and legal arguments raised in the federal petition were presented in the state courts and whether petitioner met the requirements of *Kelly.*

The first ground that respondent challenges is Ground Two (A) in which petitioner contends that his equal protection rights were violated by the exclusion of Diane Staeffler as a juror. On page 29 of his direct appeal brief, petitioner argued that the South Dakota Supreme Court should apply the standard in *Witherspoon v. Illinois,* 391 U.S. 510 (1968). *Witherspoon* specifically references the protections of the Sixth and Fourteenth Amendments. On page 41 of his brief on direct appeal, petitioner also cited to *Davis v. Georgia,* 429 U.S. 122 (1976), and *Gray v. Mississippi,* 481 U.S. 648 (1987). These cases discuss the protections of the Sixth and Fourteenth Amendments. Moreover, the South Dakota Supreme Court directly reached this issue when it found that "[b]oth the United States and South Dakota Constitutions guarantee trial by an impartial jury. (cites excluded) (holding the Sixth and Fourteenth Amendments to the United States Constitution require the 'impartiality of any jury that will undertake capital sentencing')." *See State v. Rhines,* 548 N.W.2d 415, 430, 1996 SD 55 (S.D. 1996). Petitioner has met the requirements of *Kelly* and therefore, this claim has been exhausted.

Respondent next challenges Ground Three, which alleges that petitioner's rights to due process, an impartial jury, and equal protection of the law were violated by the manner in which the state used their peremptory

challenges. Respondent acknowledges that the Sixth Amendment grounds were raised in state court, but contends that the equal protection, Fifth and Eighth Amendment grounds, were not exhausted. Petitioner agrees that he is not raising an Eighth Amendment challenge here. Petitioner raised the equal protection and Fifth Amendment issues in his direct appeal to the state supreme court when he argued at page 42 of his brief that "*Witherspoon* makes clear that excluding such jurors for cause denies a defendant's due process right to an impartial jury." By referring to *Witherspoon,* which discusses the Sixth and Fourteenth Amendments, and arguing to the South Dakota Supreme Court that his due process tight to an impartial jury was violated, petitioner has given the state courts the opportunity to review these claims and has met the *Kelley* requirements for exhaustion.

Respondent next challenges Ground Four, wherein petitioner claims that his rights to due process and equal protection were violated by the use of victim impact testimony. On page 55 of his direct appeal brief, petitioner argued that the victim impact testimony was not admissible and cited *Booth v. Maryland,* 482 U.S. 496 (1987). *Booth* discusses the application of the Eighth Amendment to the states through the Fourteenth Amendment. *See* 482 U.S. at 500 n.5. "Citation to a provision of the federal constitution or a case addressing the constitutional basis of the claim, or a discernible reference to a federal constitutional right is all that is normally required." *Graham v. Solem,* 728 F.2d 1533, 1535-36 (8th Cir. 1984). Thus, petitioner has fairly presented this claim to the state courts.

Petitioner alleges in Ground Nine that his Fifth Amendment right to due process and his Sixth Amendment right to assistance of counsel were violated due to the ineffective assistance of his trial counsel. Respondent contends that petitioner failed to raise in state court the specifics of the claim that petitioner is now raising, namely that his trial counsel was ineffective when he failed to call John Fousek, James Mighell, and Connie Royer as witnesses during the penalty phase. The record discloses that during his habeas proceedings, petitioner argued that his counsel was ineffective for failing to investigate mitigation evidence. Petitioner cited *Strickland v. Washington,* 466 U.S. 668 (1984) and the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases were admitted into evidence. The ABA Guidelines discuss the presentation of mitigation evidence and the calling of witnesses during the sentencing phase.

The United States Supreme Court has held that "the substance of a federal habeas corpus claim must first be presented to the state courts." *Picard v. Connor,* 404 U.S. 270, 278 (1971). The Eighth Circuit Court of Appeals has concluded that the courts "may review claims as long as they are closely related to claims presented to the lower courts, but . . . have required at least an 'arguable factual commonality.'" *Kenley v. Armontrout,* 937 F.2d 1298, 1303 (8th Cir. 1991) (quoting *Bolder* 921 F.2d at 1364 n.9). While petitioner presented the legal substance of his claim to the state court, he did not present the same factual argument to the state court. As a result, the court finds that this claim (Ground Nine(B)) was not fairly presented to the state courts and has not been exhausted.

Respondent also contends that petitioner failed to raise in state court that his counsel was ineffective due to the failure to correct false testimony from Glen Wishard, the failure to hire or consult with a mitigation expert, and the failure to object to the admission of petitioner's statement that he had access to a gun (Grounds Nine (H), (I), and (J)). These claims were not fully and fairly presented to the state court. Though the state habeas petition focused on the failure to investigate mitigation evidence, petitioner did not present the significant facts now alleged in the federal habeas petition to the state court. As a result, these claims (Grounds Nine (H), (I), and (J)) have not been exhausted.

Ground Ten alleges that the proportionality review conducted by the state court violated petitioner's due process, equal protection, and Eighth Amendment rights. Respondent contends that this ground is also unexhausted. In his direct appeal brief, petitioner cited three cases that discuss proportionality in the context of the Eighth Amendment prohibition against cruel and unusual punishment *State v. Marshall,* 130 N.J. 109, 613 A.2d 1059 (N.J. 1992); *Commonwealth v. Frey,* 504 Pa. 428, 475 A.2d 700 (Pa. 1984); and *State v. Rupe,* 108 Wash. 2d 734, 743 P.2d 210 (Wash. 1987). *Marshall* cites every seminal case of the United States Supreme Court that discuss [sic] the Eighth Amendment implications in the context of the death penalty, including, in part, *Furman v. Georgia,* 408 U.S. 238 (1972), *Zurek v. Texas,* 428 U.S. 262 (1976), *Proffitt v. Florida,* 428 U.S. 242 (1976), *Gregg v. Georgia,* 428 U.S. 153 (1976), and *Pulley v. Harris,* 465 U.S. 37 (1984). *Frey* cites *Zant v. Stephens,* 462 U.S. 862 (1983), *Lockett v. Ohio,* 438 U.S. 586 (1978), *Gregg,* and *Jurek.*

Rupe cites *Pulley, Furman, Zant,* and *Lockett.* The reference to these cases satisfies the requirements of *Kelly.* The state courts, therefore, have been afforded the opportunity to review this claim and the court finds that Ground Ten has been exhausted.

The parties agree that there are four grounds that are raised in the First Amended Petition for Habeas Corpus which are not exhausted. These issues are Two(B), which alleges that the exclusion of Jack Meyer violated petitioner's rights to due process, an impartial jury and equal protection; Six(E), which alleges the unconstitutionality of the South Dakota capital punishment statute and its application; Twelve, which alleges the violation of petitioner's due process and equal protection rights due to prosecutorial misconduct; and Thirteen, which alleges violations of petitioner's Fifth, Sixth, and Fourteenth Amendment rights when a jury note was handled without petitioner's presence or participation. Petitioner alleges that the four grounds in question were not exhausted due to ineffective assistance of counsel.

B. Procedural Default

Respondent contends that the unexhausted claims are procedurally defaulted because petitioner would be barred from filing a successive state habeas petition under South Dakota law. In *Ashker v. Leapley,* 5 F.3d 1178, 1180 (8th Cir. 1993), the Eighth Circuit found that after it is determined that the petitioner failed to exhaust certain issues, then the court must determine whether non-futile state court remedies remain available to the petitioner. *Ashker* concluded that under South Dakota law, the petitioner "may file another petition for habeas relief in state court if

he can show reasonable cause for omitting or inadequately raising the . . . ground in his original petition." *Id.* at 1180 (citing SDCL 21-27-16.1). Petitioner alleges that he failed to raise these issues due to ineffective assistance of counsel on his habeas petition. He has not previously presented his ineffective assistance of counsel claim to the state court. The South Dakota Supreme Court has found that "an independent right to effective assistance of counsel arises by [state] statute in post-conviction hearing." *Jackson v. Weber,* 637 N.W.2d 19, 23 (S.D. 2001). Thus, based on this record, this court cannot determine that all state court remedies available to the petitioner would be futile. As a result, before this court can consider a claim of ineffective assistance of habeas counsel, petitioner must present his claim to the state court.

C. Stay of Proceedings

Petitioner requests that the court hold the petition in abeyance while his unexhausted claims are presented to state court. Previously, the Eighth Circuit has held that a court cannot hold petitioner's current petition for habeas in abeyance while the petitioner returned to state court to exhaust his claims. *See Victor v. Hopkins.* 90 F.3d 276, 282 (8th Cir. 1996). This decision, however, was handed down prior to the United States Supreme Court's decision in *Duncan v. Walker,* 533 U.S. 167 (2001). In *Duncan,* the Court determined that the filing of a federal petition for habeas corpus does not toll the statute of limitations under the Antiterrorism and Effective Death Penalty Act (AEDPA). As a result, if petitioner's federal habeas petition were to be dismissed after pending before this court for approximately sixteen months, petitioner would be precluded from federal review of his claims, including

those that are properly before this court at this time, due to the expiration of the statute of limitations under the AEDPA. It is with this type of situation in mind that Justices Souter and Stevens advanced the idea that nothing precludes the district courts from retaining jurisdiction over a habeas petition "when the failure to retain jurisdiction would foreclose federal review of a meritorious claim because of the lapse of AEDPA's 1-year limitations period" and allowing a petitioner to return to state court to exhaust his claims. *Id.* at 183.

Other circuit courts have addressed the issue and approved of a district court staying a petition while the petitioner exhausts those claims determined to be improperly before the court. The First Circuit Court of Appeals "commend[s] such an approach . . . [when] the original habeas petition, though unexhausted, is timely filed, but there is a realistic danger that a second petition, filed after exhaustion has occurred, will be untimely." *Delaney v. Matesanz* 264 F.3d 7, 15 n.5 (1st Cir. 2001). The Second Circuit Court of Appeals has also advocated the staying of mixed petitions until the petitioner can exhaust all claims. *See Zarvela v. Artuz,* 254 F.3d 374, 380 (2d Cir. 2001). The Second Circuit also suggests, however, that time limits must be placed on the stay in order to prohibit excessive delays. *See id.* at 380-81. The Sixth Circuit Court of Appeals has adopted the approach of the Second Circuit, finding it "eminently reasonable." *Palmer v. Carlton,* 276 F.3d 777, 781 (6th Cir. 2002). This court also adopts the reasoning set forth in Justices Souter's and Stevens's concurring opinions in *Duncan* and in the opinions of the First, Second, and Sixth Circuit Courts of Appeal and will stay the petition while petitioner exhausts his claims.

Based on the foregoing discussion, it is hereby

ORDERED that respondents' motion to dismiss (Docket 77) is denied without prejudice.

IT IS FURTHER ORDERED that Grounds Two(A), Three, Four, and Ten have been exhausted and, therefore, will be considered on the merits.

IT IS FURTHER ORDERED that Grounds Two(B), Six(E), Nine(B), (H), (I) and (J), Twelve, and Thirteen are unexhausted. The petition for habeas corpus is stayed pending exhaustion of state court remedies of the claims stated in Grounds Two(B), Six(E), Nine(B) (H), (I) and (J), Twelve, and Thirteen, conditioned upon petitioner commencing state court exhaustion proceedings within sixty days of this order and returning to this court within sixty days of completing such exhaustion. If an action to exhaust state court remedies is commenced, petitioner shall immediately file a notice of such action with this court.

Dated July 3, 2002.

BY THE COURT:

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	Civ. No. 00-5020-KES NOTICE OF APPEAL (Filed Jul. 31, 2002)

Douglas Weber, Warden, South Dakota State Penitentiary, Respondent in the above-named matter, hereby gives notice that he appeals to the United States Court of Appeals for the Eighth Circuit from the Order of the United States District Court for the District of South Dakota, Western Division, entered by the Honorable Karen E. Schreier, and dated and filed July 3, 2002, on file herein. Respondent appeals from the whole of such Order.

For further identification, the Order appealed from is this Court's Docket No. 116 in the above-referenced case.

Dated this 31st day of July, 2002.

Respectfully submitted,

MARK BARNETT
ATTORNEY GENERAL

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STATE OF SOUTH DAKOTA)		
) SS		IN CIRCUIT COURT
COUNTY OF PENNINGTON)		
* * * * * * * * * * * * * * * * * *	[]	
Charles R. Rhines,	[]	SEVENTH JUDICIAL CIRCUIT
Petitioner,	[]	
	[]	CIV. ___
vs.	[]	APPLICATION FOR A WRIT OF HABEAS CORPUS
Douglas Weber, Warden: South Dakota State Penitentiary,	[]	
Respondent.	[]	
* * * * * * * * * * * * * * * * * *	[]	

COMES NOW THE PETITIONER, Charles R. Rhines, IN THE ABOVE EN-titled action, requesting the Seventh Judicial Circuit Court for the State of South Dakota to grant the Petitioner a Writ of habeas corpus.

This action is brought pursuant to SDCL § 21-27; South Dakota habeas corpus and the holding by the South Dakota Supreme Court in the case of *Jackson v. Weber*, 2001 S.D. 136.

1. Petitioner is currently a prisoner in the South Dakota Department of Corrections.

2. Petitioner is under sentence of death entered on January 29, 1993 for a conviction of First Degree murder. (Copy of judgment is herewith attached)

3. Petitioner's conviction and sentence of death have been affirmed on appeal by the South Dakota Supreme Court: *State v. Rhines*, 1996 S.D. 55, 548 N.W. 2d 415; and the United States Supreme Court has declined to review the appellate judgement.

4. That the Officer by whom the Petitioner is so imprisoned and so restrained is Douglas Weber, Warden of the South Dakota State Penitentiary.

5. The Judgement of conviction and sentence of death and resulting restraint is illegal and unconstitutional for the following reasons:

A. Petitioner received Ineffective Assistance of counsel in his first South Dakota habeas corpus action through counsel's failure to raise several issues.

B. Petitioner's South Dakota habeas corpus counsel, Michael W. Hanson, failed to raise the issue of prospective juror Jack Meyer being dismissed from the jury pool due to his having scruples concerning the death penalty, in violation of the US Supreme Court holding in *Witherspoon v. Illinois.*

C. Petitioner's South Dakota habeas corpus counsel, Michael W. Hanson, failed to raise the issue of the South Dakota Capital Punishment statutes unconstitutionallity [sic].

D. Petitioner's South Dakota habeas corpus counsel, Michael W. Hanson, failed to raise the issue of Petitioner's trial counsel's half-hearted, tepid presentation of evidence during the penalty phase of Petitioner's Capital trial by their failure to call available witnesses who would have provided helpful testimony for the Petitioner. These witnesses include but are not limited to: John Fousek, James Mighell, Connie Royer and Rick Walters.

E. Petitioner's South Dakota habeas corpus counsel, Michael W. Hanson, failed to raise the issue of Petitioner's trial counsel failing to catch and correct erroneous and false, yet highly predjudicial [sic] testimony from witness Glen Wishard.

F. Petitioner's South Dakota habeas corpus counsel, Michael W. Hanson, failed to raise the issue of the Petitioner's trial counsel's failure to register objections to keep out irrelevant yet prejudicial testimony, such as the Petitioner having access to a gun and a statement by Petitioner at the victim's funeral.

G. Petitioner's South Dakota habeas corpus counsel, Michael W. Hanson, failed to raise the issue of the prosecutor maintaining the victim's hands were tied prior to the fatal wound, when evidence was to the effect that they were tied afterwards.

H. Petitioner's South Dakota habeas corpus Counsel, Michael W. Hanson, failed to raise the issue of the prosecutor claiming that the defendant/petitioner had attempted to "gut or degut" the victim in the assault when there was no evidence to support such a claim.

I. Petitioner's South Dakota habeas corpus counsel, Michael W. Hanson, failed to raise the issue of the prosecutor using and arguing from false erroneous testimony from Glen Wishard about the defendant/petitioner's demeanor in the several hours after the assault upon the victim.

J. Petitioner's South Dakota habeas corpus counsel, Michael W. Hanson, failed to raise the issue of the prosecutor using the improper tactic of eliminating all jurors with misgivings or scruples about the imposition of the death penalty.

K. Petitioner's South Dakota habeas corpus counsel, Michael W. Hanson, failed to raise the issue of the note from the jury during penalty phase deliberations with myriad questions about the nature of life imprisonment and it's [sic] actual meanings, among other topics. Petitioner was not made aware of the existence of the jury note until after the jury had completed it's [sic] deliberations and had returned a verdict of death.

Further, Petitioner was not permitted to participate in, nor attend the discussion by counsel's and trial judge of what to do about the jury note.

L. There was no evidence presented nor was there any testimony given by any witness which laid a foundation for the jury to 'ask' the questions as stated in "k" above. Petitioner believes these questions came from extraneous information introduced to the jury after the conclusion of the trial.

The Petitioner prays the Court grant any and all relief he may be due in this matter and/or in the interests of justice, as the Court deems just and fair.

Dated this 3rd day of August, 2002 at Sioux Falls, South Dakota.

/s/ Charles R. Rhines
Charles R. Rhines,
Petitioner, Pro Se
P.O. Box 5911
Sioux Falls, SD 57117-5911

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Charles R. Rhines
Charles R. Rhines,
Petitioner

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT

CHARLES RUSSELL RHINES, Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	CIV. #02-_____ CERTIFICATE OF SERVICE

The undersigned hereby certifies that true a copy of Application for a Writ of Habeas Corpus and Motion for Appointment of Counsel in the above matter were served by first-class mail, postage prepaid, upon the following:

Craig M. Eichstadt
Deputy Attorney General
Attorney General's Office
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Pierre, SD 57501-5070

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United States Court Of Appeals

FOR THE EIGHTH CIRCUIT

No. 02-2990

Charles Russell Rhines, Petitioner-Appellee, v. Douglas Weber, Warden, South Dakota State Penitentiary, Respondent-Appellant.	*	Appeal from the United States District Court for the District of South Dakota **[PUBLISHED]**

Submitted: September 2, 2003

Filed: October 7, 2003

Before LOKEN, Chief Judge, BRIGHT and MURPHY, Circuit Judges.

PER CURIAM.

South Dakota inmate Charles Russell Rhines filed this petition for a writ of habeas corpus, alleging that numerous constitutional errors infected his 1993 first-degree murder conviction. The district court entered an order declaring that Rhines failed to exhaust some federal claims and that non-futile state court remedies may still be available to him. The court stayed all claims pending exhaustion of state court remedies for the unexhausted

claims. Warden Douglas Weber appeals. We have jurisdiction under the collateral order doctrine to review an interlocutory order holding a habeas petition in abeyance pending exhaustion of state court remedies. *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998).

This court has recently addressed the question whether habeas claims may be stayed while the habeas petitioner seeks state court remedies on claims that may be unexhausted. *Akins v. Kenney*, No. 02-1913, slip op. at 7-9 (8th Cir. Sep. 2, 2003). *Akins* precludes the district court from staying Rhines's exhausted claims while he seeks state post-conviction relief on other claims that may be unexhausted. However, *Akins* did not decide whether a petitioner may delete unexhausted claims while proceeding only on the claims he believes are fully exhausted. Nor did *Akins* preclude a petitioner from electing to forego further state court proceedings, in which case he would presumably proceed on all claims in the federal habeas action and contest any argument by respondent that the unexhausted claims are procedurally barred. These issues are better addressed initially in the district court. Accordingly, the district court's order of July 3, 2002 is vacated, and the case is remanded for further consideration.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 02-2990	*	
	*	
Charles Russell Rhines,	*	
	*	
Appellee,	*	Appeal from the
	*	United States District
vs.	*	Court for the District
	*	of South Dakota
Douglas Weber, Warden,	*	
South Dakota State Penitentiary,	*	
	*	
Appellant.	*	

JUDGMENT

(Filed: Dec. 3, 2003)

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is vacated and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

(5172-010199)

October 7, 2003

ORDER ENTERED IN ACCORDANCE WITH OPINION
/s/ Michael E. Gans
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 02-2990	*	
	*	
Charles Russell Rhines,	*	
	*	
Appellee,	*	Order Denying Petition
	*	for Rehearing and for
v.	*	Rehearing En Banc
	*	
Douglas Weber, Warden, etc.,	*	
	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

November 24, 2003

ORDER ENTERED IN ACCORDANCE WITH OPINION

/s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

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548 N.W.2d 415

Supreme Court of South Dakota.

STATE of South Dakota, Plaintiff and Appellee,

v.

Charles Russell RHINES, Defendant and Appellant.

No. 18268.

Argued Oct. 18, 1995.
Decided May 15, 1996.
Rehearing Denied June 28, 1996.

Mark Barnett, Attorney General, Grant Gormley, Craig M. Eichstadt, and Sherri Sundem Wald, and Gary Campbell, Assistant Attorneys. General, Pierre, for plaintiff and appellee.

Michael Stonefield, Pennington County Public Defender's Office, Joseph M. Butler of Bangs, McCullen, Butler, Foye & Simmons, and Wayne F. Gilbert of Johnson Huffman, Rapid City, for defendant and appellant.

MILLER, Chief Justice.

From the latter part of 1991 through February 1992, Charles Russell Rhines worked at the Dig 'Em Donut Shop on West Main Street in Rapid City, South Dakota. In February 1992 Rhines was terminated from this job.

On March 8, 1992, the body of Donnivan Schaeffer, an employee of Dig 'Em Donuts, was found in the storeroom of the donut shop on West Main Street. Schaeffer's hands were bound, and he had been repeatedly stabbed. Approximately $3,300 in cash, coins, and checks was missing from the store. Additional facts will be recited herein as they relate to specific issues.

The State charged Rhines with third-degree burglary of the store and first-degree murder of Schaeffer. A jury convicted him of these crimes. The jury recommended a sentence of death for the first-degree murder conviction. The trial court entered a judgment and warrant of execution. Rhines appeals. We affirm.

ISSUE 1.

Did the trial court err by not suppressing incriminating statements made by Rhines to law enforcement officers on June 19 and 21, 1992?

At approximately 12:45 p.m. on June 19, 1992, Rhines was arrested in King County, Washington, for a burglary that occurred in that state. King County Police Officer Michael Caldwell read Rhines the following *Miranda* warning:

> You have the right to remain silent. Number 2, anything you say or sign can be used as evidence against you in a court of law. Number 3, you have the right at this time to an attorney of your own choosing, and to have him present before saying or signing anything. Number 4, if you cannot afford an attorney, you are entitled to have an attorney appointed for you without cost to you and to have him present before saying and signing anything. Number 5, you have the right to exercise any of the above rights at any time before saying or signing anything. Do you understand each of these rights that I have explained to you?

According to Officer Caldwell, Rhines responded by asking something to the effect, "Those two detectives from South Dakota are here, aren't they?" Caldwell made no reply. Caldwell did not attempt to question Rhines, and Rhines

made no further statements to Caldwell. Rhines was placed in a holding cell at a King County police station.

At 6:56 p.m. that same day, two South Dakota law enforcement officers, Detective Steve Allender of the Rapid City Police Department and Pennington County Deputy Sheriff Don Bahr, interrogated Rhines about the burglary of Dig 'Em Donuts and the murder of Schaeffer. Detective Allender testified that he advised Rhines of his *Miranda* rights prior to questioning him. The exchange between himself and Rhines is as follows:

> Allender: You have the continuing right to remain silent. Do you understand that?
>
> Rhines: Yes.
>
> Allender: Anything you say can be used as evidence against you. Do you understand that?
>
> Rhines: Yes.
>
> Allender: You have the right to consult with and have the presence of an attorney, and if you cannot afford an attorney, an attorney can be appointed for you free of charge. Do you understand that?
>
> Rhines: Yes.
>
> Allender: Having those rights in mind, are you willing to answer questions?
>
> Rhines: Do I have a choice?

Allender testified he told Rhines he did have a choice and in fact Rhines did not have to talk with them at all. Allender then asked if Rhines wanted to talk with them and Rhines said, "I suppose so," and then said, "I'll answer any questions I like." Shortly thereafter, Rhines confessed to

the burglary of Dig 'Em Donuts and to the killing of Schaeffer.

Approximately two hours later, Rhines gave the officers permission to tape record his statements. The following exchange occurred:

> Allender: Ok. Um, do you remember me reading you your rights?
>
> Rhines: Yes.
>
> Allender: In the beginning? Did you understand those rights?
>
> Rhines: Yes.
>
> Allender: And uh, having those rights in mind you talked to us here?
>
> Rhines: Yes I have.

During the taped portion of the interview, Rhines again made incriminating statements about the burglary of Dig 'Em Donuts and the killing of Schaeffer.

On June 21, 1992, Detective Allender and Deputy Sheriff Bahr posed additional questions to Rhines. This interview was tape recorded. Prior to questioning, Detective Allender had the following conversation with Rhines:

> Allender: You have the continuing right to remain silent, do you understand that?
>
> Rhines: Yes.
>
> Allender: Anything you say can be used as evidence against you. Do you understand that?
>
> Rhines: Yes.

> Allender: You have the right to consult with and have the presence of an attorney, and if you cannot afford an attorney, an attorney can be appointed for you free of charge. Do you understand that?
>
> Rhines: Yes.
>
> Allender: K. Just like the other night, having these rights in mind, are you willing to answer questions?
>
> Rhines: Yes.
>
> Allender: Ok. And that, in this case, it goes, if you don't like the question, it doesn't mean that you're supposed to answer it. You can always say stop, ok?
>
> Rhines: I can take the 5th Amendment.
>
> Allender: Exactly.

Rhines proceeded to make incriminating statements about the burglary of Dig 'Em Donuts and the death of Schaeffer.

Rhines filed a pretrial motion to suppress the incriminating statements made to the officers on June 19 and 21, 1992. After a hearing, the trial court denied this motion. At trial, Detective Allender testified regarding Rhines' statements during the untaped portion of the June 19, 1992, interview. Rhines entered a continuing objection to this testimony. Over Rhines' objection, the trial court also permitted the State to play the recordings of the interviews that took place on June 19 and 21, 1992. Rhines claims the trial court erred in admitting his statements.

Rhines argues the trial court erred in failing to suppress the incriminating statements he made during the June 19 and 21 interviews. He claims that the *Miranda* warnings recited to him were deficient for several reasons. He also asserts that he never gave a valid waiver of his

Miranda rights. We will consider each of his contentions in turn.

Preliminarily, we reiterate that the Fifth Amendment to the United States Constitution provides in part:

> No person . . . shall be compelled in any criminal case to be a witness against himself[.]

U.S. Const.Amend. V.[1] The Fifth Amendment privilege against self-incrimination is implicated whenever an individual is subjected to a custodial interrogation by the police. *Miranda v. Arizona,* 384 U.S. 436, 478, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694, 726 (1966). To protect the privilege, law enforcement personnel must observe certain procedural safeguards. 384 U.S. at 478-79, 86 S.Ct. at 1630, 16 L.Ed.2d at 726. In the absence of other equivalent procedures, law enforcement must advise a suspect as follows:

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

384 U.S. at 479, 86 S.Ct. at 1630, 16 L.Ed.2d at 726. If the individual indicates at any time before or during questioning that he wishes to remain silent or that he wants an attorney, the interrogation must end. 384 U.S. at 473-74, 86 S.Ct. at 1627-28, 16 L.Ed.2d at 723. If law enforcement fails to follow these or other equivalent procedures, the

[1] Article VI, § 9, of the South Dakota Constitution states in relevant part: "No person shall be compelled in any criminal case to give evidence against himself[.]"

prosecution may not use statements made during a custodial interrogation as proof of guilt. 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706.

Importantly, *Miranda* does not require that warnings be given in the exact form described in that decision. *Duckworth v. Eagan,* 492 U.S. 195, 202, 109 S.Ct. 2875, 2880, 106 L.Ed.2d 166, 176 (1989). "[T]he words of *Miranda* do not constitute a ritualistic formula which must be repeated without variation in order to be effective. Words which convey the substance of the warning along with the required information are sufficient." *Evans v. Swenson,* 455 F.2d 291, 295 (8th Cir.1972), *cert. denied,* 408 U.S. 929, 92 S.Ct. 2508, 33 L.Ed.2d 342 (1972) (citations omitted).

1. The right to terminate questioning.

Rhines contends Detective Allender's warnings on June 19 and June 21, 1992, failed to advise him of his right to terminate questioning at any time. Rhines further argues that Officer Caldwell's earlier recitation, which includes such a warning, cannot be combined with Detective Allender's advisement to arrive at a sufficient warning. Rhines reasons that, since he never told Caldwell he understood the rights that Caldwell recited to him, the State failed to show that Rhines understood his right to terminate questioning.

Rhines points to State v. Brings Plenty, 459 N.W.2d 390 (S.D.1990), as support for his claim that the "continuing right to remain silent" warning was insufficient. In *Brings Plenty,* the trial court ruled that statements by the defendant which were coerced and involuntary could be used to impeach the defendant, should he testify. *Id.* at

394. On appeal, we reversed and granted the defendant a new trial on the grounds that involuntary statements are inadmissible for any purpose. *Id.* at 397.

In dicta, we criticized a warning that was essentially identical to the warning given to Rhines.[2] We reasoned the advisement was deficient under *Miranda,* because it failed to inform the defendant of his right to terminate questioning at any time. *Id.* at 395-96.

Rhines' reliance on *Brings Plenty* is misplaced. First, the discussion of the warning in *Brings Plenty* is not binding precedent. Second, Detective Allender's statement that Rhines had a "continuing right to remain silent" adequately advised him of his option to terminate questioning at any time. Additional warnings given to Rhines on June 19 and 21 reinforced this advisement. When Rhines was first arrested on June 19, 1992, Officer Caldwell told him, "You have the right to remain silent. . . . [Y]ou have the right to exercise any of the above rights at any time before saying or signing anything." There was no intervening interrogation of Rhines between his arrest and questioning by Allender and Bahr that might blunt the effect of this warning.

Rhines counters that his June 19 confession must be suppressed, because there was no showing that he understood the warnings given by Caldwell and Allender concerning the right to terminate questioning. We reject

[2] According to the briefs in *Brings Plenty,* the officer advised defendant as follows: Ok, you have the continuing right to remain silent. Anything you say can be used as evidence against you. You have the right to consult with and the presence of an attorney. If you cannot afford an attorney, an attorney will be appointed to you. Do you understand these rights . . . ?

Rhines' assertion. There is ample evidence in the record indicating that Rhines had a complete understanding of his right to stop the questioning at any time. Before making any incriminating statements on June 19, Rhines specifically told Allender he would only answer the questions he liked. When the officers questioned him about a topic he did not wish to discuss, he would shut off the tape recorder or tell them to "be quiet." (For example, during the June 19, 1992 interview, Rhines turned off the recorder when the officers began to discuss whether he had been coerced into making a statement. He then explained his personal feelings toward a young man he knew and asked the officers not to dwell on the young man's involvement in the burglary of the donut shop. The officers agreed to that.)

Excerpts from the taped interview of June 19, clearly show Rhines understood his right to terminate questioning as explained by Officer Caldwell. Law enforcement adequately advised Rhines of his *Miranda* rights prior to the interview on June 19. The trial court did not abuse its discretion in admitting the statements made by Rhines on that date.

On June 21, 1992, the only advisement Rhines received was from Detective Allender. (*See* ¶ 8 supra). Allender's advisement at that time that Rhines need not answer questions he did not like and that he "can always say stop" adequately warned Rhines of his right to terminate questioning at any time. A *Miranda* warning need not be elegantly phrased or mechanically recited. *United States v. Noa,* 443 F.2d 144, 146 (9th Cir.1971) (citing *Camacho v. United States,* 407 F.2d 39, 42 n. 2 (9th Cir.1969)). The purpose of the *Miranda* warning is to explain an aspect of constitutional law to a criminal

suspect, so that he can make a voluntary, knowing and intelligent decision whether to talk to the police. Allender's straightforward statements and conversational tone are an acceptable method of advising an individual of his constitutional right to be silent in the face of police interrogation. Furthermore, Rhines' response that he "can take the 5th Amendment" demonstrates that he amply understood his privilege against self-incrimination.

2. The right to an attorney during questioning.

On June 19 and 21, 1992, Allender advised Rhines: "You have the right to consult with and have the presence of an attorney[.]" Rhines alleges this warning was deficient, because it did not explain the right to have an attorney present *during questioning* or the continuing right to request the presence of an attorney *at any point during questioning.* He contends his inculpatory statements to police should have been suppressed due to these deficiencies.

This Court has held that the statement, "You have the right to consult with and the presence of an attorney," satisfied the requirement that the suspect be advised of the right to have an attorney present *prior* to any questioning. *Brings Plenty,* 459 N.W.2d at 395. *Accord State v. Croucher,* 326 N.W.2d 98, 98-99 (S.D.1982). We must now consider whether an essentially identical warning adequately communicates the right to have an attorney present *during* questioning.

Rhines was told at the beginning of each interview that he had the right to the presence of an attorney. Because this warning was delivered at the start of each questioning session, it plainly communicated the right to

have an attorney present at that time. *Evans,* 455 F.2d at 295-96; *Sweeney v. United States,* 408 F.2d 121, 124 (9th Cir.1969); *People v. Johnson,* 90 Mich.App. 415, 282 N.W.2d 340, 342 (1979). We therefore find no *Miranda* violation.

3. The right to appointment of an attorney.

On June 19 and 21, 1992, Allender informed Rhines, "if you cannot afford an attorney an attorney can be appointed for you free of charge." According to Rhines, Detective Allender's statement that an attorney "can" be appointed is ambiguous and legally insufficient. He argues that *Miranda* requires he be advised an attorney *would* or *must* be appointed if he cannot afford to hire one.

At the heart of the *Miranda* opinion is the "concern that the indigent accused in police custody be informed that he has just as much right to representation by an attorney as a person who can afford one." *Mayfield v. State,* 293 Ark. 216, 736 S.W.2d 12, 14-15 (1987), *cert. denied,* 485 U.S. 905, 108 S.Ct. 1076, 99 L.Ed.2d 235 (1988). The *Miranda* Court wrote:

> In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent – the person most often subjected to

> interrogation – the knowledge that he too has a right to have counsel present.

384 U.S. at 473, 86 S.Ct. at 1627, 16 L.Ed.2d at 723. *Miranda* therefore mandated that a suspect be advised "if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." 384 U.S. at 479, 86 S.Ct. at 1630, 16 L.Ed.2d at 726.

Although the warning need not contain the exact language used in the *Miranda* opinion, it must effectively communicate the right to appointed counsel if the accused cannot afford to hire a lawyer. *Mayfield,* 736 S.W.2d at 15. In determining whether a particular warning adequately conveys this right, a reviewing court must look to the warnings as a whole rather than focusing on one sentence in isolation. *United States v. Miguel,* 952 F.2d 285, 288 (9th Cir.1991) (citing *Duckworth,* 492 U.S. at 205, 109 S.Ct. at 2881, 106 L.Ed.2d at 178).

In advancing his argument that Allender's warnings were deficient, *Rhines relies on United States v. Connell,* 869 F.2d 1349 (9th Cir.1989). In *Connell,* the Ninth Circuit Court of Appeals suppressed incriminating statements made by a defendant after he had been given a flawed advisement concerning the right to appointed counsel. *Id.* at 1353. We believe the facts in *Connell* to be clearly distinguishable.

In contrast to the defendant in *Connell,* Rhines was never told he would have to make his own arrangements for an attorney or that the government would not pay for his attorney. Nor was his right to appointed counsel contingent on a nebulous reference to the requirements of the law. Allender expressly informed Rhines of his right to remain silent, to consult with an attorney, and to have an

attorney present. In this context, Rhines was also told that an attorney "can" be appointed if Rhines could not otherwise afford one. There was no additional information to mislead him into believing that an attorney would not be appointed if he could not pay for one.

Based on the totality of the warning given to Rhines, we conclude the advisement reasonably conveyed the right to appointed counsel. *See also Duckworth,* 492 U.S. at 200-01, 109 S.Ct. at 2879, 106 L.Ed.2d at 175-76; *Miguel,* 952 F.2d at 287-88; *Tasby v. United States,* 451 F.2d 394, 398-99 (8th Cir.1971), *cert. denied,* 406 U.S. 922, 92 S.Ct. 1787, 32 L.Ed.2d 122 (1972); *State v. Blanford,* 306 N.W.2d 93, 95-96 (Iowa 1981); State v. Strain, 779 P.2d 221, 223-24 (Utah 1989).

4. Waiver of Miranda rights.

Rhines contends he was never told that, by agreeing to answer questions, he would be waiving the rights which had just been recited to him. Nor, he argues, was he specifically asked whether he was willing to waive these rights. He was simply asked, "Having these rights in mind, are you willing to answer questions?" Rhines contends this was an inadequate explanation of his option to waive *Miranda* rights and prevented him from giving a valid waiver. We disagree. An advisement need not specifically refer to a "waiver" of rights in order to be valid.

> "'*Miranda* is not a ritual of words to be recited by rote according to didactic niceties. What *Miranda* does require is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. We will not indulge semantical debates between counsel over the particular words used to inform an individual of his rights.'"

Blanford, 306 N.W.2d at 96 (quoting *Coyote v. United States,* 380 F.2d 305, 308 (10th Cir.1967), *cert. denied,* 389 U.S. 992, 88 S.Ct. 489, 19 L.Ed.2d 484 (1967)).

Having determined that the warning was adequate, we must now consider whether Rhines gave a valid waiver of his rights. When the State offers an incriminating statement allegedly made by the defendant, the State has the burden of proving beyond a reasonable doubt that the statement was given knowingly, intelligently, and voluntarily. *State v. Volk,* 331 N.W.2d 67, 70 (S.D.1983). In determining whether a defendant has given a valid waiver of his *Miranda* rights, we look to the totality of the circumstances, "'including the background, experience, and conduct of the accused.'" *State v. Braddock,* 452 N.W.2d 785, 788 (S.D.1990) (quoting *State v. West,* 344 N.W.2d 502, 504 (S.D.1984)). The trial court's finding that the defendant's rights had been waived and his statements were voluntary must be upheld unless it is clearly erroneous. *Braddock,* 452 N.W.2d at 788 (citations omitted).

A waiver of *Miranda* rights need not be express, but "may be inferred from the defendant's understanding of his rights coupled with a course of conduct reflecting his desire to give up his right to remain silent and have the counsel of an attorney." *United States v. Betts,* 16 F.3d 748, 763 (7th Cir.1994) (citing *Fare v. Michael C.,* 442 U.S. 707, 724-25, 99 S.Ct. 2560, 2571-72, 61 L.Ed.2d 197, 212 (1979); *North Carolina v. Butler,* 441 U.S. 369, 373, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286 (1979)).

Rhines' conduct shows a valid waiver. When asked whether he understood his rights, Rhines responded that he did. He then answered affirmatively when asked if he was willing to answer questions. He was articulate and

detailed in making his statements. There is no indication that Rhines was under the influence of drugs or alcohol or that he was otherwise impaired in his functioning. Nor is there any showing that law enforcement officers unlawfully induced or coerced Rhines to make a confession. Additionally, Rhines clearly understood the consequences of relinquishing his rights, including the fact that his statements could be used against him in court. Referring to his reasons for confessing to the murder, Rhines remarked, "This will come out in court again." At another point in the questioning, Rhines told Allender and Bahr, "If you guys bring some of this stuff into court, you're gonna look really foolish[.]" When Allender reminded Rhines that "this isn't court," Rhines replied, "No. But it will be." Rhines also boldly professed to have knowledge of the statutory and case law.

Rhines' gratuitous statements reflect an individual who is aware of the potentially grave legal consequences of his confession. The trial court was not clearly erroneous in concluding that Rhines made a knowing and voluntary decision to relinquish his *Miranda* rights.

ISSUE 2.

Did the trial court err in excusing a prospective juror for cause?

As part of the jury selection process, the defense and prosecution thoroughly questioned prospective jurors. When Diane Staeffler was called for questioning, defense counsel explained the two-step process for determining guilt and setting a sentence in a capital case. After extensive questioning by the defense, the State, and the trial court regarding whether Staeffler could consider imposing

the death penalty on a defendant, the trial court denied the State's challenge for cause. The court then permitted the State to resume questioning Staeffler regarding capital punishment, followed by additional inquiries on the subject by the defense and the court. After this additional questioning, the court excused Staeffler from jury duty for cause.

Rhines challenges the trial court's ruling on two grounds. First, Rhines contends it was error for the court to permit the State to continue questioning Staeffler about her feelings on the death penalty after the trial court had already allowed such questioning and had denied the State's challenge for cause. According to Rhines, State's ensuing questions were leading and argumentative and unfairly caused Staeffler to express an unwillingness to consider the death penalty. Second, Rhines contends the trial court's subsequent decision to excuse Staeffler for cause was a violation of the rule set forth in *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). He argues that *Witherspoon* requires that the trial court discharge for cause only those who make it unmistakably clear they cannot and will not follow the court's instructions with respect to the death penalty. He claims the elimination of a qualified juror from the panel in violation of *Witherspoon* invalidates the death sentence imposed on him.

Both the United States and South Dakota Constitutions guarantee trial by an impartial jury. *State v. Hansen,* 407 N.W.2d 217, 220 (S.D.1987) (citing U.S.Const.Amend. VI; S.D.Const. Art. VI, § 7; SDCL 23A-16-3); *Morgan v. Illinois,* 504 U.S. 719, 728, 112 S.Ct. 2222, 2229, 119 L.Ed.2d 492, 502 (1992) (holding the Sixth and Fourteenth Amendments to the United States Constitution require

"the impartiality of any jury that will undertake capital sentencing"). Jury selection is an important means of ensuring this right. The voir dire process is designed to eliminate persons from the venire who demonstrate they cannot be fair to either side of the case. *Morgan,* 504 U.S. at 734 n. 7, 112 S.Ct. at 2232 n. 7, 119 L.Ed.2d at 506 n. 7 (citing *Smith v. Balkcom,* 660 F.2d 573, 578 (5th Cir.1981), *modified,* 671 F.2d 858 (5th Cir.1982), *cert. denied,* 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982)).

In *Witherspoon,* the Court held: "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522, 88 S.Ct. at 1777, 20 L.Ed.2d at 784-85. The Court reasoned that executing a death sentence returned by such a jury deprives the defendant of his life without due process of law and infringes his right to trial by an impartial jury under the Sixth and Fourteenth Amendments. 391 U.S. at 518, 88 S.Ct. at 1775, 20 L.Ed.2d at 783. The Court observed:

> [T]he decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death.

391 U.S. at 521-22 n. 20, 88 S.Ct. at 1776-77 n. 20, 20 L.Ed.2d at 784-85 n. 20.

The Court suggested that the State could legitimately exclude "those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death." 391 U.S. at 520, 88 S.Ct. at 1776, 20 L.Ed.2d at 784. However, when the State swept from the jury those who simply expressed conscientious or religious scruples

against capital punishment or who opposed it in principle, it crossed a constitutional line. 391 U.S. at 520-21, 88 S.Ct. at 1776, 20 L.Ed.2d at 784.

The United States Supreme Court has since held that the improper exclusion of even one potential juror with general objections to capital punishment requires reversal of the death penalty. *Davis v. Georgia,* 429 U.S. 122, 123, 97 S.Ct. 399, 400, 50 L.Ed.2d 339, 341 (1976); *see also Gray v. Mississippi,* 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) (plurality opinion). In determining whether a prospective juror may be excluded for cause, the Court applies the following standard: Would the individual's views "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841, 851-52 (1985). With these principles in mind, we now consider Rhines' contentions.

1. Continued questioning of Staeffler.

Rhines contends the trial court improperly permitted the State to resume questioning Staeffler after initially denying a challenge for cause. We disagree. The "latitude allowed to counsel in voir dire of prospective jurors rests largely in the trial court's discretion." *State v. Miller,* 429 N.W.2d 26, 38 (S.D.1988) (citing *State v. Muetze,* 368 N.W.2d 575, 584 (S.D.1985)). Before the court denied the challenge for cause, the State expressly reserved the opportunity to continue questioning Staeffler "depending on the Court's ruling." The court then proceeded to question Staeffler about her ability to decide the case. First, the court asked Staeffler if she could fulfill a juror's oath

to be fair and impartial and to follow the law. Staeffler responded affirmatively. Second, the court asked if Staeffler could "consider all the law and options that the law allows." Staeffler agreed that she could. The court then denied the challenge. However, Staeffler's response to subsequent questions from the State demonstrates that she was confused by the court's questions and that additional clarification was necessary. Although Staeffler told the court she could follow its instructions, she immediately indicated to the State that she was not aware this would include consideration of the death penalty.

> State: Ma'am, the Judge just asked you whether you could consider all the options.
>
> Staeffler: Is that the death penalty?
>
> State: That includes the death penalty?
>
> Staeffler: Well – I don't know.

The defense then interjected its objection to further questioning of Staeffler about capital punishment. However, it had just become apparent that Staeffler's promises to follow the law did not take into account her reservations about the death penalty. In response to subsequent questions by the State, Staeffler's misunderstanding of the court's questions became even more apparent:

> State: What I have been asking you about is whether or not you can fairly consider it as the Judge asked you in terms of having both options, including imposing death upon this man, Mr. Rhines, and what I need to clear up is, when you answered Judge Konenkamp, did you understand what he was asking you?

Staeffler: Apparently not the first time about considering both options.

Because Staeffler had not understood the court's questions, her ability to impartially follow the court's instructions was still undetermined. We cannot fault the court for allowing additional inquiries regarding her ability to serve. As the United States Supreme Court observed:

> Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. *Rosales-Lopez v. United States,* 451 U.S. 182, 188, 101 S.Ct. 1629, 1634, 68 L.Ed.2d 22 (1981) (White, J., plurality opinion). Hence, "[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness." *Aldridge v. United States,* 283 U.S. 308, 310, 51 S.Ct. 470, 471-72, 75 L.Ed. 1054 (1931).

Morgan, 504 U.S. at 729-30, 112 S.Ct. at 2230, 119 L.Ed.2d at 503. In light of her misunderstanding of the court's inquiries, we find no abuse of discretion in giving the State the opportunity to clarify Staeffler's answers.

Nor do we agree with Rhines' claim that the State's questions were misleading or argumentative. We can detect no material difference between the questioning by the State or by defense counsel. Both the State and the defense questioned Staeffler at length about her position on the death penalty. Both used leading questions during their examination. Indeed, Staeffler's uncertainty and vacillation necessitated lengthy, detailed inquiries and the use of leading questions. Her apparent contradictions

concerning her ability to follow the court's instructions had to be explored by counsel for both sides. The defense even seemed to acknowledge the usefulness of leading questions in ascertaining Staeffler's views. At one point, defense counsel said to Staeffler, "I know I probably have been putting words in your mouth or trying to, but I don't intend to, but I'm trying to get at where you are really at on this death penalty." Later, defense counsel stated to Staeffler, "[The State's counsel is] trying to lead you down a road and I'm trying to lead you down a road, but here's what we need, we need jurors who come into this case and even though you have very strong reservations about the death penalty, we need jurors like you as well[.]" Staeffler's answers during *voir dire* appear to genuinely reflect her personal objections to capital punishment and her unwillingness to participate in the process of imposing a penalty of death. In light of similar questioning by the State and the defense, we cannot conclude that Staeffler's responses were the product of intimidation or confusion caused by the State.

2. Disqualification of Staeffler.

Rhines claims the trial court improperly excused Staeffler for cause. Rhines asserts the trial court "can only exclude those who have *unequivocally* and *without contradiction* expressed a complete inability to impose the death penalty." (Emphasis in original.) The law does not demand such precision. In *Wainwright,* the Court held that a juror's bias need not be proved with "unmistakable clarity." The Court explained:

> [D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense

> should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Wainwright, 469 U.S. at 424-26, 105 S.Ct. at 852-53, 83 L.Ed.2d at 852-53.

In accordance with the Court's reasoning, our state law vests a trial judge with broad discretion in determining juror qualifications. *Hansen,* 407 N.W.2d at 220 (citing *State v. Flack,* 77 S.D. 176, 180, 89 N.W.2d 30, 32 (1958)). "The ruling of the trial court will not be disturbed, except in the absence of any evidence to support it[.]" *Flack,* 77 S.D. at 181, 89 N.W.2d at 32. "When the evidence of each juror is contradictory in itself, and is subject to more than one construction, a finding by the trial court either way upon the challenge is conclusive on appeal." *Id.* at 181, 89 N.W.2d at 32.

To support his claim of error, Rhines notes Staeffler responded affirmatively when the court asked if she could follow the law. However, as noted above, Staeffler misunderstood the court's query and did not realize that following the law included consideration of the death penalty. Furthermore, the impartiality of a juror "must be based upon the whole voir dire examination and single isolated responses are not determinative." *First Bank of South*

Dakota v. Voneye, 425 N.W.2d 630, 633 (S.D.1988) (citing *Hansen,* 407 N.W.2d at 220; *Flack,* 77 S.D. at 181, 89 N.W.2d at 32). Although Staeffler said at various times during voir dire that she could consider a death sentence during penalty deliberations, she also stated that she could *not* consider capital punishment under any circumstances. She made still other statements indicating that, while she might be able to consider capital punishment, she could not be fair and impartial. Staeffler said she did not like the death penalty and "would rather not" sit on a jury in a capital case. She said she did not know if she could sleep at night if she voted to impose the death penalty. When asked if she could be part of a jury that sentenced a defendant to death, Staeffler said, "Probably not" and "I don't think I could really do it." Even when defense counsel described murders that Staeffler described as "just awful," she responded, "I still don't want to make the [death penalty] decision." Upon additional questioning by the State, Staeffler said she thought capital punishment was appropriate at times but noted she was not the one making the penalty decision. Although she said that imposition of the death penalty would depend on the circumstances, she also stated that she could not imagine any circumstances where she could impose a death sentence. If selected for jury duty, she stated she would be leaning toward imposing a life sentence as opposed to the death penalty. When asked by the trial court if she would fairly consider both options, she stated, "No, I guess not." She later said, "I could consider [the death penalty], but I don't want to. I wouldn't want to make the decision for death." She then reiterated that she could not give fair consideration to both options of life imprisonment and the death penalty.

Based on a complete review of Staeffler's testimony, we conclude that her views on the death penalty would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." *Wainwright,* 469 U.S. at 424, 105 S.Ct. at 852, 83 L.Ed.2d at 851-52. The trial court did not abuse its discretion in excusing her for cause.

ISSUE 3.

Did the State use peremptory challenges in violation of due process guarantees by excluding prospective jurors with reservations about the death penalty?

It is undisputed the State used peremptory challenges to eliminate prospective jurors who had some reservations about capital punishment. These individuals had indicated they could set aside their doubts and be fair and impartial and were therefore not excludable for cause under *Witherspoon* and its progeny. The State also waived its 19th and 20th peremptory challenges in an attempt to seat a jury before a prospective juror who had expressed equivocal sentiments about the death penalty could be called for individual questioning.

Rhines contends the State's use of peremptory challenges violated his constitutional right to a trial by a fair and impartial jury. He argues the State should not be permitted to peremptorily challenge all jurors with mere qualms about the death penalty when it is prohibited from excluding the same individuals for cause. He reasons that a jury which, because of the State's selective use of peremptory challenges, does not have any members with reservations about capital punishment is no different than

a jury from which members of that group have been excluded for cause. Rhines thus asserts his conviction and sentence must be reversed for a new trial by a jury that has not been culled of all who question the wisdom of the death penalty.

By statute, the prosecution and the defense are each given an equal number of peremptory challenges. SDCL 23A-20-20. A peremptory challenge "is an objection to a juror for which no reason need be given." SDCL 23A-20-19. It can be exercised "'without inquiry and without being subject to the court's control.'" *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, ___, 114 S.Ct. 1419, 1431, 128 L.Ed.2d 89, 108 (1994) (O'Connor, J., concurring) (quoting *Swain v. Alabama,* 380 U.S. 202, 220, 85 S.Ct. 824, 836, 13 L.Ed.2d 759, 772 (1965)). An exception is upon a prima facie showing that the prosecutor used peremptory challenges in a racially or sexually discriminatory manner. *Batson v. Kentucky,* 476 U.S. 79, 96-7, 106 S.Ct. 1712, 1723, 90 L.Ed.2d 69, 87-88 (1986); *J.E.B.,* 511 U.S. at ___, 114 S.Ct. at 1429, 128 L.Ed.2d at 106-07. The prosecutor then has the burden of establishing nondiscriminatory reasons for striking particular members of the venire. *Batson,* 476 U.S. at 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88; *J.E.B.,* 511 U.S. at ___, 114 S.Ct. at 1429, 128 L.Ed.2d at 106-07. This restriction on the State's use of peremptory challenges is based on the principle that a person's race or gender is unrelated to his fitness as a juror. *See Batson,* 476 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81; *J.E.B.,* 511 U.S. at ___, 114 S.Ct. at 1426-27, 128 L.Ed.2d at 102-04. However, "[t]here is no basis for declaring that a juror's attitudes towards the death penalty are similarly irrelevant to the outcome of a capital sentencing proceeding." *Brown v. North Carolina,* 479 U.S. 940, 941, 107 S.Ct. 423, 424, 93

L.Ed.2d 373, 374 (1986) (O'Connor, J., concurring). In fact, "a juror's views on capital punishment, unlike his or her race, are directly related to potential performance on a capital jury." *State v. Fullwood,* 323 N.C. 371, 373 S.E.2d 518, 525 (1988), *vacated on other grounds,* 494 U.S. 1022, 110 S.Ct. 1464, 108 L.Ed.2d 602 (1990). Ignoring these attitudes would severely inhibit the State's prosecution of capital crimes and defense counsel's zealous representation of their clients.

> There can be no dispute that a prosecutor has the right, indeed the duty, to use all legal and ethical means to obtain a conviction, including the right to remove peremptorily jurors whom he believes may not be willing to impose lawful punishment. Of course, defense counsel has the same right and duty to remove jurors he believes may be prosecution oriented. This Court's precedents do not suggest that the *Witherspoon* line of cases restricts the traditional rights of prosecutors and defense counsel to exercise their peremptory challenges in this manner.

Gray, 481 U.S. at 671-72, 107 S.Ct. at 2058, 95 L.Ed.2d at 641-42 (Powell, J., concurring).

United States Supreme Court precedent teaches that "'jury competence is an individual rather than a group or class matter.'" *J.E.B.,* 511 U.S. at ___, 114 S.Ct. at 1434, 128 L.Ed.2d at 112 (Kennedy, J., concurring) (quoting *Thiel v. Southern Pac. Co.,* 328 U.S. 217, 220, 66 S.Ct. 984, 985, 90 L.Ed. 1181, 1185 (1946)). The discriminatory use of peremptories based on race or gender gives effect to an invidious group stereotype and preempts an individualized assessment of competency. That is not the case where a juror is peremptorily challenged due to his or her own views of the death penalty. In that case, counsel has made

a particularized and fact-based appraisal of the prospective juror's ability to judge fairly and impartially. Pernicious group biases have not been given effect in that circumstance.

Rhines also ignores an important distinction between peremptory challenges and challenges for cause. Challenges for cause are unlimited, while peremptory challenges are restricted in number. In *Witherspoon,* state law permitted the prosecution to excuse for cause all jurors who expressed *any* conscientious scruples against capital punishment. 391 U.S. at 514, 88 S.Ct. at 1772-73, 20 L.Ed.2d at 780. This broad-based rule of exclusion gave the State a decided advantage in jury selection, because it was automatically guaranteed a jury free of any reservations about the death penalty.

In contrast, peremptory challenges are limited and both the State and the defendant receive the same number. SDCL 23A-20-20. Consequently, the prosecution and the defense have an equal opportunity to remove those members of the venire who, while able to follow the instructions of the court, espouse extreme views of capital punishment. *See Brown,* 479 U.S. at 941, 107 S.Ct. at 424, 93 L.Ed.2d at 374 (O'Connor, J., concurring in denial of certiorari).

> "[W]e see no . . . constitutional infirmity in permitting peremptory challenges by both sides on the basis of specific juror attitudes on the death penalty. While a statute requiring exclusion of all jurors with any feeling against the death penalty produces a jury biased in favor of death, we have no proof that a similar bias arises, on either guilt or penalty issues, when *both parties* are allowed to exercise their equal, limited numbers of peremptory challenges . . . against jurors

> harboring specific attitudes they reasonably believe unfavorable."

People v. Gordon, 50 Cal.3d 1223, 270 Cal.Rptr. 451, 475, 792 P.2d 251, 275 (1990) (quoting *People v. Turner,* 37 Cal.3d 302, 208 Cal.Rptr. 196, 690 P.2d 669 (1984)) (emphasis in original), *cert. denied,* 499 U.S. 913, 111 S.Ct. 1123, 113 L.Ed.2d 231 (1991). *See also J.E.B.,* 511 U.S. at ___, 114 S.Ct. at 1431, 128 L.Ed.2d at 108 (O'Connor, J., concurring) ("Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminat[ing] extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury.") (quoting *Holland v. Illinois,* 493 U.S. 474, 484, 110 S.Ct. 803, 809, 107 L.Ed.2d 905 (1990)).

Importantly, Rhines does not identify any jurors who were biased in favor of the State or otherwise incapable of fairly weighing the facts and applying the law. He simply objects to the elimination of jurors who may have been less inclined to impose a death sentence. "[A]n impartial jury consists of nothing more than 'jurors who will conscientiously apply the law and find the facts.'" *Lockhart v. McCree,* 476 U.S. 162, 178, 106 S.Ct. 1758, 1767, 90 L.Ed.2d 137, 151 (1986) (quoting *Wainwright,* 469 U.S. at 423, 105 S.Ct. at 852, 83 L.Ed.2d at 841) (emphasis deleted). "[W]e do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor." *Wainwright,* 469 U.S. at 423, 105 S.Ct. at 852, 83 L.Ed.2d at 851. Furthermore, the law does not demand a balanced sampling of opinions in the jury box.

> [I]f it were true that the Constitution required a certain mix of individual viewpoints on the jury, then trial judges would be required to undertake the Sisyphean task of "balancing" juries, making sure that each contains the proper number of Democrats and Republicans, young persons and old persons, white-collar executives and blue-collar laborers, and so on.
>
> * * *
>
> . . . [I]t is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints. Prospective jurors come from many different backgrounds, and have many different attitudes and predispositions. But the Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.

Lockhart, 476 U.S. at 183-84, 106 S.Ct. at 1770, 90 L.Ed.2d at 154-55.

We therefore hold there is no state or federal constitutional prohibition against the State's use of peremptory challenges to exclude all prospective jurors who expressed reservations about the death penalty but were not excludable for cause on that basis.

ISSUE 4.

Do South Dakota's capital punishment statutes violate the state or federal constitution?

Rhines contends that South Dakota's capital punishment statutes violate the state and federal constitutions

on a number of grounds. In considering his claims, we reiterate that there is a strong presumption in favor of the constitutionality of a statute. *State v. Floody,* 481 N.W.2d 242, 255 (S.D.1992) (citing *Simpson v. Tobin,* 367 N.W.2d 757, 765 (S.D.1985)). This presumption is rebutted only when it appears clearly, palpably, and plainly that the statute violates a constitutional provision. *Id.*

1. Distinctions between felony murder and premeditated murder.

To satisfy constitutional requirements, a capital sentencing scheme "must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens,* 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235, 249-50 (1983). Under South Dakota law, both felony murder and premeditated murder are punishable by death or by life imprisonment. SDCL 22-16-4; 22-16-12; 22-6-1.

At the time of the killing of Schaeffer, South Dakota law defined felony murder as a homicide "committed by a person engaged in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, or unlawful throwing, placing or discharging of a destructive device or explosive." SDCL 22-16-4. Premeditated murder is defined as a homicide "perpetrated without authority of law and with a premeditated design to effect the death of the person killed or of any other human being." *Id.*

In order to impose a death sentence on an individual convicted of either felony murder or premeditated murder, the jury must find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt.

SDCL 23A-27A-4, -5. At the time of Rhines' crime, SDCL 23A-27A-1 listed the following aggravating circumstances:

> (1) The offense was committed by a person with a prior record of conviction for a Class A or Class B felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions;
>
> (2) The defendant by his act knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
>
> (3) The defendant committed the offense for himself or another, for the purpose of receiving money or any other thing of monetary value;
>
> (4) The defendant committed the offense on a judicial officer, former judicial officer, prosecutor, or former prosecutor while such prosecutor, former prosecutor, judicial officer, or former judicial officer was engaged in the performance of his official duties or where a major part of the motivation for the offense came from the official actions of such judicial officer, former judicial officer, prosecutor, or former prosecutor;
>
> (5) The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person;
>
> (6) The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;
>
> (7) The offense was committed against a law enforcement officer, employee of a corrections institution,

or fireman while engaged in the performance of his official duties;

(8) The offense was committed by a person in, or who has escaped from, the lawful custody of a law enforcement officer or place of lawful confinement;

(9) The offense was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another; or

(10) The offense was committed in the course of manufacturing, distributing, or dispensing substances listed in Schedules I and II in violation of § 22-42-2.

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Rhines argues that individuals who commit felony murder are less culpable than those who are guilty of premeditated murder, presumably because they lack the specific intent to kill another human being. He claims the law therefore fails to distinguish between those individuals who deserve the death penalty and those who do not.

We reject Rhines' claim for three reasons. First, we note Rhines was convicted of premeditated murder, not felony murder. Therefore, any constitutional inequities in the punishment of felony murderers are inapplicable to his case. Second, we cannot agree that individuals who commit murder while engaged in other serious crimes are less deserving of the death penalty than those who commit premeditated murder. Rhines implies that only those who intend to kill should qualify for the death penalty. While we agree that intent is a relevant consideration, we do not agree that only those who intend to kill should receive the ultimate punishment. The malicious motives elemental to felony murder can also justify a sentence of death. The law

is free to equally condemn those who murder with the intent to kill and those who also murder, but do so with the intent to rape, steal, or burn.

Third, in claiming that felony murder is less deserving of capital punishment, Rhines ignores the long list of statutory aggravating circumstances that further limit the imposition of the death sentence. Unless the jury finds at least one of these aggravating circumstances, indicating more extreme criminal culpability, an individual guilty of felony murder cannot receive the death sentence. We therefore conclude the State's capital sentencing scheme "reasonably justif[ies] the imposition of a more severe sentence on [certain] defendant[s] compared to others found guilty of murder." *Zant*, 462 U.S. at 877, 103 S.Ct. at 2742, 77 L.Ed.2d at 249-50. Rhines' constitutional challenge is rejected.

2. Defining and narrowing "death eligible" offenses.

Without identifying any other specific infirmities, Rhines separately alleges that the legislature's broad delineation of Class A felonies, combined with the statutory aggravating circumstances in SDCL 23A-27A-1, does not sufficiently narrow and define the pool of "death eligible" offenses. He further argues that the trial court may not cure these constitutional defects by fashioning jury instructions to define and limit capital crimes. He asserts that to do so would violate the separation of powers between the legislative and judicial branches and represent an unconstitutional delegation of legislative authority.

Rhines makes the generalized complaint that the pool of death eligible offenses is too broad. He does not articulate any specific reasons why these classifications are inadequate. We note the United States Supreme Court has approved a state capital punishment scheme that is nearly identical to South Dakota's death penalty laws. *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Rhines' general allegations defy more meaningful review and therefore fail.

As to Rhines' claim that state courts are prohibited from fashioning limiting instructions, we must disagree. The United States Supreme Court has held that the existence of vague and overbroad definitions of capital crimes does not necessarily establish a constitutional violation. *Walton v. Arizona,* 497 U.S. 639, 653-54, 110 S.Ct. 3047, 3057, 111 L.Ed.2d 511, 528-29 (1990). The Court expressly acknowledged that a state court may further define and limit otherwise vague and overbroad aggravating factors so as to provide guidance to the sentencer and satisfy constitutional requirements. 497 U.S. at 654, 110 S.Ct. at 3057, 111 L.Ed.2d at 529.

3. Guidance concerning mitigating evidence.

When the jury returns a guilty verdict in a capital case, the trial court must conduct a presentence hearing before the jury. SDCL 23A-27A-2. At that time, the jury may hear additional evidence in mitigation and aggravation of punishment. *Id.* Under South Dakota's capital sentencing statutes, the jury must find the existence of an aggravating circumstance beyond a reasonable doubt before it may impose the death penalty. SDCL 23A-27A-4 and -5. The law permits the jury to consider any

mitigating circumstances, but does not impose any standard of proof regarding mitigation. SDCL 23A-27A-1 and -2.

Rhines asserts that death sentences will be arbitrarily imposed in violation of the state and federal constitutions, because the South Dakota capital sentencing statutes do not include a standard of proof for mitigating circumstances or otherwise explain how the jury should weigh evidence of mitigation.

In determining whether an individual eligible for the death penalty should in fact receive that sentence, the law demands that the jury make "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Tuilaepa v. California,* 512 U.S. 967, ___, 114 S.Ct. 2630, 2635, 129 L.Ed.2d 750, 760 (1994) (citations omitted) (emphasis in original). "The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Blystone v. Pennsylvania,* 494 U.S. 299, 307, 110 S.Ct. 1078, 1083, 108 L.Ed.2d 255, 264 (1990). Capital sentencing procedures that permit the jury to exercise wide discretion in evaluating mitigating and aggravating facts are consistent with an individualized sentencing determination. *Tuilaepa,* 512 U.S. at ___, 114 S.Ct. at 2636, 129 L.Ed.2d at 761. South Dakota's open-ended treatment of mitigating evidence coincides with the mandate of individualized sentencing.

Our state's capital sentencing scheme is modeled after Georgia's sentencing procedures. In *Gregg,* a plurality of the United States Supreme Court gave tacit approval to the Georgia scheme:

> While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence[.]

Gregg, 428 U.S. at 206-07, 96 S.Ct. at 2941, 49 L.Ed.2d at 893 (plurality opinion of Stewart, Powell, and Stevens, J.J.). *See also Zant*, 462 U.S. at 875, 103 S.Ct. at 2741-42, 77 L.Ed.2d at 248-49 (noting the *Gregg* Court approved Georgia's capital sentencing statute even though it did not enunciate specific standards to guide the jury's consideration of aggravating and mitigating circumstances).

Similarly, the Court has opined: "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision . . . . '[D]iscretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed' is not impermissible in the capital sentencing process." *Tuilaepa*, 512 U.S. at ___, 114 S.Ct. at 2638-39, 129 L.Ed.2d at 764 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 315 n. 37, 107 S.Ct. 1756, 1779 n. 37, 95 L.Ed.2d 262, 293 n. 37 (1987)). The Court has stated its position in even more emphatic terms:

> We have rejected the notion that "a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." *Franklin v. Lynaugh*, 487 U.S. 164, 179, 108 S.Ct. 2320, 2330, 101 L.Ed.2d 155, 169 (1988). Equally settled is the corollary that the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer.

Harris v. Alabama, 513 U.S. 504, ___, 115 S.Ct. 1031, 1035, 130 L.Ed.2d 1004, 1014 (1995). Based on this authority, we conclude that South Dakota's statutes adequately direct the jury's evaluation of aggravating and mitigating evidence during the capital sentencing phase.

4. The jury as sentencer.

SDCL 23A-27A-4 states that upon receipt of a jury recommendation of death, the trial judge "*shall* sentence the defendant to death." (Emphasis supplied.) Rhines contends this mandatory provision prevents the trial judge from ruling on the appropriateness of the jury's verdict, as he may in other cases, and therefore violates equal protection guarantees. He asserts the trial court cannot consider whether the sentence was imposed arbitrarily, whether the evidence supported the jury's finding of an aggravating circumstance, and whether the sentence was excessive or disproportionate to the penalty imposed in similar cases. He further argues the mandatory nature of the jury's verdict denies the capital defendant the opportunity to request a judgment of acquittal or file a motion for a new trial.

Neither the state nor federal constitution require the trial court to review the propriety of the jury's sentencing decision in a capital case. The United States Supreme Court has approved a capital sentencing scheme that permits the jury, rather than the trial court, to make the sentencing decision. *Gregg*, 428 U.S. at 206-07, 96 S.Ct. at 2940-41, 49 L.Ed.2d at 893 (plurality opinion of Stewart, Powell, and Stevens, J.J.); *Gregg*, 428 U.S. at 221-24, 96 S.Ct. at 2947-49, 49 L.Ed.2d at 901-04 (concurring opinion of White, Rehnquist, J.J., and Burger, C.J.). In approving

this scheme, the Court did not mandate that the trial judge independently review the jury's sentencing decision. Additionally, in *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), the Court seemed to acknowledge the jury's legitimate role as sentencer in a capital case: "This Court's decisions indicate that the discretion of the sentencing authority, *whether judge or jury,* must be limited and reviewable." 468 U.S. at 462, 104 S.Ct. at 3163, 82 L.Ed.2d at 354 (emphasis added). The Court further wrote:

> We have no particular quarrel with the proposition that juries, perhaps, are more capable of making the life-or-death decision in a capital case than of choosing among the various sentencing options available in a noncapital case. Sentencing by the trial judge certainly is not required by *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). What we do not accept is that, *because juries may sentence,* they constitutionally must do so. (Emphasis supplied.)

468 U.S. at 463 n. 8, 104 S.Ct. at 3163-64 n. 8, 82 L.Ed.2d at 354 n. 8.

In addition, unlike any other criminal defendants, individuals who are sentenced to death by a jury or a trial judge receive automatic appellate review of their sentence. SDCL 23A-27A-9 ("If the death penalty is imposed, and if the judgment becomes final in the trial court, the sentence *shall* be reviewed on the record by the South Dakota Supreme Court.") (Emphasis supplied.) In evaluating the sentence, this Court must determine:

> (1) Whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 23A-27A-1; and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

SDCL 23A-27A-12.

In light of this Court's sweeping, mandatory review of a capital defendant's sentence, we find no constitutional error in vesting the sentencing decision solely in the jury rather than the trial court.

ISSUE 5.

Did the trial court abuse its discretion in admitting statements by Rhines concerning inequities in the justice system?

Over Rhines' objection, the trial court admitted the following portion of his June 19, 1992, taped confession for the jury's consideration during the guilt phase of the trial:

> Allender: You don't really buy into our justice system do you? I mean you don't really believe in it?
>
> Rhines: Justice?
>
> Allender: Yeah.
>
> Rhines: For who? If I had $100,000 for a fancy attorney I'd walk. Free, on an acquittal.
>
> Bahr: Do you think that's right, that, that?
>
> Rhines: Do you?
>
> Bahr: No, not if you took a life.

Rhines: You know it's true.

Bahr: Do you . . .

Rhines: If I had $100,000 to drop into the best attorney in the country or in the midwest region.

Bahr: But see anything's possible, Charles. But if somebody takes a life.

Rhines: I've seen guilty and then walk. Knowing they were guilty.

Bahr: Would you want to get off?

Rhines: Would you?

Bahr: I'm not in that predicament.

Rhines: Me neither.

Bahr: You've been completely honest with us, Charles?

Rhines: I'm not, I'm not in a predicament of wanting to get off and having the wherewithal to do so. I'm in the predicament of wanting to get off and not having the wherewithal to do so.

Bahr: Have you been truthful with us?

Rhines: As much as I can emotionally.

Bahr: These sequences as best your, that you can remember? I don't have anything further.

Allender: Either do I.

Rhines: Do you suppose uh try for a last Camel before the night?

Allender: Yeah.

Rhines: It's gonna be kind of rough (inaudible -- talking over)

Allender: Um, just a second. This will be the end of this tape is 2232.

The trial court found the discussion gave insight into the nature of Rhines' statements to law enforcement officers, showed his state of mind at the time of his confession, and allowed the jury to weigh Rhines' attitude about his confession and his crime. The court further found the probative value of this evidence outweighed any prejudicial effect.

During the penalty phase of the trial, the State asked the court to instruct the jury to reconsider the evidence previously entered during the guilt proceedings. This would necessarily include Rhines' statements regarding the justice system. The defense did not raise any objections and the jury was instructed to reconsider all evidence previously admitted during the guilt phase.[3]

Rhines argues his statements concerning the justice system were not relevant to either the guilt or sentencing proceedings. He disputes the trial court's finding that his remarks were relevant to his state of mind or the reliability of his confession. He asserts the statements were inadmissible character evidence, that portrayed him as a bad person who distrusted and scorned the criminal

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[3] Under SDCL 23A-27A-12, this Court must determine "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor." Because of this independent basis for reviewing the proceedings in a capital sentencing hearing, we need not decide whether the failure to renew evidentiary objections during the penalty phase constitutes a waiver or triggers plain error analysis. *See State v. Sonnier*, 379 So.2d 1336, 1370 (La.1980).

justice system. Rhines acknowledges that the effect of these statements on the jury's guilty verdict "may well have been minor or slight." However, he asserts the admission of his statements unfairly prejudiced him during the sentencing phase of the trial and warrant reversal of the jury's death sentence.

According to the State, Rhines' remarks reflect on the reliability and voluntariness of his statements, a relevant inquiry during the guilt phase of the trial. The State also asserts the sentencer must have a broad range of information so that it may appropriately determine the sentence, and evidence of Rhines' background and character, particularly his lack of remorse, was highly relevant to this determination. Even if the evidence was not admissible, the State argues any error was harmless.

"Evidence which is not relevant is not admissible." SDCL 19-12-2. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." SDCL 19-12-1. However, the trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice [.]" SDCL 19-12-3. This delicate balancing process is within the trial court's sound discretion and the court's ruling will not be disturbed absent abuse. *State v. Cross,* 390 N.W.2d 564, 566 (S.D.1986); *State v. Thomas,* 381 N.W.2d 232, 235 (S.D.1986).

1. Admissibility at guilt phase.

Contrary to Rhines' contention, the trial court properly determined his statements were relevant to the

determination of guilt. The remarks in question tend to show the truthfulness of Rhines' confession. Rhines compared himself to other individuals who are guilty of murder. He referred to "wanting to get off." He also stated that he was as truthful as he could be with the officers. All of these statements reinforce State's assertion that Rhines killed Schaeffer and that his confession to the crime was freely and knowingly given.

Nor can we conclude that admission of the remarks unduly prejudiced Rhines during the guilt phase. Prejudice "refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *State v. Holland,* 346 N.W.2d 302, 309 (S.D.1984). The statements in question were brief and occurred at the end of Rhines' lengthy and detailed confession. In this context, the jury was more likely to rely on the statements for their legitimate purpose – as proof of the reliability of Rhines' confession, rather than as evidence of bad character.

Even if the statements were improperly admitted, it would constitute harmless error. Evidence of Rhines' guilt was overwhelming. Rhines confessed to the burglary and murder four times, once to a young woman and three times to law enforcement officers. The jury even listened to tape recordings of Rhines confessing to the burglary and the murder. His statements about the location of clothing and other items that he discarded after the crime were substantiated by witnesses who discovered the items. The defense did not refute any of the State's evidence, having rested immediately after the conclusion of the State's case. In light of the strong evidence of Rhines' guilt, it is unlikely the jury would unfairly rely on Rhines' disputed statements in rendering a guilty verdict.

2. Admissibility at penalty phase.

In all capital cases where the jury has rendered a guilty verdict, state law requires a hearing prior to sentencing. SDCL 23A-27A-2. "Such hearing shall be conducted to hear additional evidence in mitigation and aggravation of punishment." *Id.* In this case, the trial court granted a defense motion prohibiting the State from offering any evidence on non-statutory aggravating factors. The State was therefore restricted to offering evidence that related to the aggravating circumstances set forth in SDCL 23A-27A-1.

Rhines contends the disputed statements were irrelevant to any of the aggravating circumstances urged by the State. We disagree. One aggravating factor alleged by the State was that Rhines committed the murder to avoid being arrested for burglary. SDCL 23A-27A-1(9). In the disputed discussion, Rhines indicated he wanted "to get off" and that only his lack of money prevented him from doing so. His desire to avoid punishment in spite of his admitted wrongdoing directly relates to his alleged motive for killing Schaeffer – to avoid lawful arrest and confinement. The possibility that the jury might disapprove of Rhines' cynical attitude is not enough to defeat the probative value of this evidence. Furthermore, even if the evidence was irrelevant or unfairly prejudicial, any error was harmless. There was ample evidence relating to the circumstances of the murder. As noted above, Rhines confessed four times, once to a young woman and three times to law enforcement officers, and the jury listened to recordings of two of Rhines' confessions. Armed with Rhines' own account of his crime, it is unlikely the jury relied on the disputed remarks in ascertaining the circumstances of Schaeffer's death and rendering its sentence.

ISSUE 6.

Did the trial court abuse its discretion in refusing to appoint a forensic communication expert to assist Rhines in preparing his case?

Rhines submitted a pretrial motion for appointment of a forensic communication expert to conduct and analyze a community attitude study and design a supplemental juror questionnaire at the county's expense. Rhines was concerned that his homosexuality would unfairly influence the jury, and he anticipated using the community attitude survey and juror questionnaire to address this issue. The trial court denied Rhines' motion.

Rhines claims the denial of the motion was an abuse of the trial court's discretion. He contends voir dire alone was an inadequate method for detecting and eliminating jurors with biases against homosexuality. To support his claim, he points to portions of a three-page note composed by the jury and delivered to the court during penalty deliberations. The note included the following questions:

> Will Mr. Rhines be allowed to mix with the general inmate population?
>
> Will Mr. Rhines be allowed to discuss, describe or brag about his crime to other inmates, especially new and or young men jailed for lesser crimes (Ex: drugs, DWI, assault, etc.)?
>
> Will Mr. Rhines be allowed to marry or have conjugal visits?
>
> Will Mr. Rhines be jailed alone or will he have a cell mate?

The trial court responded to the jury's questions with the following written statement: "I acknowledge your note

asking questions about life imprisonment. All the information I can give you is set forth in the jury instructions."

Rhines contends the jury's note reflected homophobic sentiments that improperly affected jury deliberations. He asks this Court to reverse his conviction and sentence and order that he receive the requested expert assistance on retrial.

The appointment of an expert is within the trial court's discretion. *State v. Stuck,* 434 N.W.2d 43, 50 (S.D.1988) (citing *State v. Archambeau,* 333 N.W.2d 807, 811 (S.D.1983)). "Trial courts should scrutinize a defense request for an expert to insure that an indigent defendant may procure any reasonable defense, and, when in doubt, lean toward the appointment of such an expert." *Id.* at 51 (citing *State v. Hallman,* 391 N.W.2d 191, 195 (S.D.1986)). Where an indigent defendant such as Rhines requests appointment of an expert at county expense, four requirements must be satisfied: (1) the request must be in good faith; (2) it must be reasonable in all respects; (3) it must be timely and specifically set forth the necessity of the expert; and (4) it must specify that the defendant is financially unable to obtain the required service himself and that such services would otherwise be justifiably obtained were defendant financially able. *Id.* (Citations omitted.)

In this case, there was no necessity for a public opinion survey and supplemental questionnaire to ascertain juror bias. "[V]oir dire examination is the better forum for ascertaining the existence of hostility towards the accused." *State v. Smith,* 477 N.W.2d 27, 33 (S.D.1991) (citing *State v. Reutter,* 374 N.W.2d 617, 629 (S.D.1985)). Our review of voir dire shows an impartial jury was

impaneled. Defense counsel questioned eleven of the twelve jurors regarding their feelings about homosexuality. Ten of the jurors expressed neutral feelings about homosexuality, indicating it would have no impact on their decision making. The eleventh juror stated that she regards homosexuality as sinful. However, she also stated Rhines' sexual orientation would not affect how she decided the case. Rhines' counsel did not seek to remove this juror from the panel.

Although Rhines contends the jury's note to the judge shows a bias against homosexuality, we do not agree. The jury's questions during the penalty phase relate to prison conditions rather than Rhines' sexual orientation. The jurors began the note with the following statement:

> Judge Konnekamp [sic],
>
> In order to award the proper punishment we need a clear prospective [sic] of what "Life In Prison Without Parole" really means. We know what the Death Penalty Means, but we have no clue as to the reality of Life Without Parole.

Other questions posed by the jury involved whether Rhines would be given work release, placed in a minimum security prison, allowed to create a group of followers or admirers, permitted to attend college, or allowed to "have or attain any of the common joys of life (ex TV, Radio, Music, Telephone or hobbies and other activities allowing him distraction from his punishment)." The jury also asked what the daily routine would be in prison. The jury closed with these remarks:

> We are sorry, Your Honor, if any of these questions are inappropriate but there seems to be a huge gulf between our two alternatives. On one hand there is

> Death and on the other hand what is Life in prison w/out parole.

In this context, the jury's questions about Rhines marrying, having a cell mate or conjugal visits, and having contact or discussions with other inmates do not reflect a bias against Rhines' sexual preference. Instead, they reflect the jury's legitimate efforts to weigh the appropriateness of life imprisonment versus the death penalty. We find no abuse of discretion by the trial court.

ISSUE 7.

Did the trial court abuse its discretion by refusing three of Rhines' proposed jury instructions?

The trial court refused Rhines' proposed jury instructions Nos. 8, 9 and 11. Rhines claims the trial court's failure to give these instructions violated the due process and cruel punishment clauses of the United States and South Dakota Constitutions.

The trial court has broad discretion in instructing the jury. *State v. Bartlett,* 411 N.W.2d 411, 415 (S.D.1987). "[J]ury instructions are adequate when, considered as a whole, they give the full and correct statement of the law applicable to the case." *State v. Fast Horse,* 490 N.W.2d 496, 499 (S.D.1992) (citing *State v. Grey Owl,* 295 N.W.2d 748, 751 (S.D.1980)) (emphasis omitted). To warrant reversal, the trial court's refusal to give an appropriate instruction must unfairly prejudice the defendant. The defendant must show that "'the jury might and probably would have returned a different verdict if [the] instruction had been given.'" *Bartlett,* 411 N.W.2d at 415 (quoting *Grey Owl,* 295 N.W.2d at 751, *appeal after remand,* 316 N.W.2d 801 (S.D.1982)).

We will consider each of Rhines' proposed jury instructions separately.

1. Proposed jury instruction No. 8: sufficiently substantial aggravating circumstances.

Rhines' proposed jury instruction No. 8 stated in relevant part:

> South Dakota law allows the imposition of the death penalty only if the prosecution, in addition to proving that the defendant is guilty of murder in the first degree, also proves each of the following beyond a reasonable doubt:
>
> (1) That one or more of the alleged aggravating circumstances exist; and
>
> (2) That the aggravating circumstance or circumstances, considered in connection with any mitigating circumstances, are sufficiently substantial to require the death penalty in this case, and that death is the only appropriate punishment for the crime committed, and for the defendant.

Rhines contends the proposed instruction was necessary to suitably limit and guide the jury's sentencing discretion. We disagree. Rhines' proposed instruction would require that aggravating circumstances be "sufficiently substantial." Neither the state nor federal constitutions impose this requirement. Once the sentencer finds the existence of a statutory aggravating circumstance, it has broad discretion to decide whether to impose the sentence of death. Further, the "sufficiently substantial" standard does little to aid the jury in its difficult sentencing decision. The trial court instructed the jury that the death penalty could not be imposed unless at least one

aggravating circumstance was present beyond a reasonable doubt. The trial court further instructed that the jury could impose a penalty of life imprisonment even if it found the existence of one or more statutory aggravating circumstances, explaining that a life sentence could be imposed for any or no reason. These instructions were sufficient to guide the jury's discretion.

2. Rhines' proposed jury instruction No. 9: presumption of life imprisonment.

Rhines' proposed instruction No. 9 stated in pertinent part:

> The law also presumes that the appropriate sentence for murder in the first degree is life in prison without parole. This presumption is sufficient to justify your recommendation that the appropriate sentence in this case is life in prison without parole. Only if the jury is unanimously convinced beyond a reasonable doubt both that one or more aggravating circumstances exist, and that the death penalty is the only appropriate sentence in this case, may the jury return a verdict recommending a sentence of death.

According to Rhines, his death sentence violates the due process and cruel punishment clauses of the state and federal constitutions, because the jury was not instructed regarding the presumption in favor of life imprisonment over the death penalty.

The trial court's instructions adequately advised the jury of the State's burden of proof and the presumption of innocence in favor of the defendant. The court instructed the jury:

> In this case the law raises no presumption against the Defendant, but every presumption of the law is in favor of his innocence as to the alleged aggravating circumstances. He is not required to prove himself innocent of the aggravating circumstances, or put in any evidence at all upon that subject. The fact that the Defendant has not testified in this case raises no presumption against him, and you must give no thought to the fact that the Defendant did not testify in his own behalf in this case in arriving at your sentencing decision.

Furthermore, the law gives the jury broad discretion to impose life imprisonment rather than a sentence of death, and the trial court properly instructed the jury in this regard. As noted above, the trial court informed the jury they could impose a life sentence regardless of whether they found any aggravating circumstances that might otherwise authorize the imposition of the death penalty. The trial court further advised the jury that they need not find the existence of any mitigating facts or circumstances in order to fix the penalty at life imprisonment. Finally, the court charged the jury that they may fix the penalty at life imprisonment for any reason or without any reason. These instructions, taken together, amply informed the jury of their authority to set the penalty at life imprisonment. There was no abuse of discretion in refusing Rhines' proposed instruction.

3. Rhines' proposed jury instruction No. 11: effect of life or death sentences.

Rhines' proposed jury instruction No. 11 stated:

> The two specified sentences that you are to consider in this case are death, and life in prison without parole.

> In your deliberations, you are to presume that if you sentence Charles Russell Rhines to death, he will in fact be executed by lethal injection. You must not assume or speculate that the courts, or any other agency of government, will stop the defendant's execution from taking place.
>
> Similarly, you are to presume that if you sentence Charles Russell Rhines to life in prison without parole, he will in fact spend the rest of his natural life in prison. You must not assume or speculate that the courts, or any other agency of government, will release the defendant from prison at any time during his life.

The note sent by the jury to the trial judge asked whether Rhines could ever be placed in a minimum security prison or given work release. According to Rhines, this demonstrates that the trial court's instructions were inadequate, and that the jury was unduly concerned that Rhines would be released if he received a life sentence. He claims he was unfairly prejudiced by the trial court's refusal to read the instruction.

We believe the trial court's instruction adequately advised the jury regarding the effect of either a life or death sentence. The trial court informed the jury:

> The decision you make will determine the sentence which will be imposed by the court. If you decide on a sentence of death, the court will impose a sentence of death. If you decide on a sentence of life imprisonment without parole, the court will impose a sentence of life imprisonment without parole.

The trial court's instruction gave a "full and correct statement of the law." There was no error in refusing Rhines' proposed instruction.

ISSUE 8.

Did the trial court err in allowing victim impact testimony during the penalty phase of the trial?

SDCL 23A-27A-1 sets forth the aggravating circumstances which may be considered by a judge or jury when determining whether to impose the sentence of death. Effective July 1, 1992, nearly four months after the murder of Donnivan Schaeffer, the legislature amended SDCL 23A-27A-1 to permit "testimony regarding the impact of the crime on the victim's family."[4] 1992 S.D.Sess.L. ch. 173, § 2.

During a pretrial motion hearing, the State gave oral notice of intent to offer victim impact testimony at the penalty phase of the proceedings. Rhines filed a motion to exclude any such testimony. Following a hearing, the trial court ruled that victim impact testimony would be allowed during the penalty proceedings based on the case of *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). The Court indicated that such evidence could be offered "in response to Defendant's mitigating evidence."

Peggy Schaeffer, Donnivan Schaeffer's mother, read the following statement during State's rebuttal at the penalty hearing:

> Donnivan was our youngest son. He was a happy, considerate and helpful young man. His dreams were to finish school, live on his own, and get married. He attended Vo-Tech and had a job waiting for him when he graduated. His plan was to marry Sheila Pond in May, 1993. Our dreams were becoming his dreams

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[4] This provision has since been deleted from SDCL 23A-27A-1 and inserted in SDCL 23A-27A-2.

and those dreams are never to be a reality. Not having Donnivan with us has left us with heartache and sadness that at times seem unbearable. Now, at the end of the hall in our home is a bedroom filled with memories and we can only dream of the future Donnivan may have had.

Rhines contends the trial court committed reversible error by allowing the introduction of Peggy Schaeffer's victim impact testimony. He makes numerous arguments in support of his position. First, Rhines asserts the *Payne* decision simply authorizes states to pass laws that allow the sentencer to consider some types of victim impact evidence. He argues that at the time of Rhines' alleged offense, South Dakota statutes and case law did not authorize admission of victim impact testimony, so the evidence was inadmissible. Second, Rhines notes the South Dakota Legislature did amend SDCL 23A-27A-1 to explicitly allow victim impact testimony, but only did so after Schaeffer's murder and the Court's decision in *Payne*. Rhines contends the amendment is a substantive rather than a procedural law. Because this statutory provision was not in effect at the time of Rhines' alleged offense, he argues the admission of victim impact testimony violated the constitutional prohibition against *ex post facto* laws. *See* U.S.Const. Art. I, § 10; S.D.Const. Art. VI, § 12. Third, Rhines objects to the characterization of the victim impact statement as a rebuttal to evidence offered by Rhines during the penalty phase. During the sentencing proceedings, Rhines offered the testimony of his two sisters. He claims their testimony was limited to his upbringing and their relationship with him; they did not testify to Donnivan Schaeffer's character or the impact of his death on his family. Fourth, even if otherwise admissible, Rhines claims Peggy Schaeffer's testimony went beyond the

bounds of victim impact testimony, because at least half of the statement described Schaeffer's personal characteristics rather than the impact of his death. Finally, Rhines asserts the improper admission of Peggy Schaeffer's testimony was not harmless error, because the jury likely would have imposed a less severe sentence without this evidence.

We hold that the trial court did not abuse its discretion in admitting the victim impact testimony. In *Payne*, 501 U.S. at 817, 111 S.Ct. at 2604, 115 L.Ed.2d at 730, the Court reconsidered whether "the Eighth Amendment prohibits a capital sentencing jury from considering 'victim impact' evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family." The Court had previously held that such evidence was *per se* inadmissible in the penalty phase of a capital trial. *Payne*, 501 U.S. at 811, 111 S.Ct. at 2601, 115 L.Ed.2d at 726 (citing *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989); *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987)).

The Court began by noting that the impact of a defendant's crime is a relevant sentencing consideration:

> [T]he assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment.

Payne, 501 U.S. at 819, 111 S.Ct. at 2605, 115 L.Ed.2d at 731. The Court further observed that "the sentencing authority has always been free to consider a wide range of relevant material." 501 U.S. at 820-21, 111 S.Ct. at 2606,

115 L.Ed.2d at 732. As to the propriety of admitting victim impact testimony in a capital sentencing proceeding, the Court reasoned:

> Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities . . . . We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family. By turning the victim into a faceless stranger at the penalty phase of a capital trial, *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

501 U.S. at 825, 111 S.Ct. at 2608, 115 L.Ed.2d at 735 (citations and quotations omitted). The Court therefore concluded "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." 501 U.S. at 827, 111 S.Ct. at 2609, 115 L.Ed.2d at 736.

Payne was decided in June, 1991, months before Rhines' murder of Schaeffer in March, 1992. Therefore, the rule in *Payne* does not implicate *ex post facto* analysis. However, Rhines contends that *Payne* requires a specific

state statute authorizing the admission of victim impact evidence. We can discern no such requirement in the Court's opinion. In fact, the Court seems to regard victim impact testimony as no different than other evidence for purposes of determining admissibility. The *Payne* Court wrote: "There is no reason to treat such evidence differently than other relevant evidence is treated." 501 U.S. at 827, 111 S.Ct. at 2609, 115 L.Ed.2d at 736.

Under South Dakota law, evidence is generally admissible so long as it is relevant and is not unfairly prejudicial. SDCL 19-12-2, -3. We review the trial court's ruling on the admissibility of evidence under the abuse of discretion standard. *Thomas,* 381 N.W.2d at 235.

The victim impact statement read by Schaeffer's mother related to her son's personal characteristics and the emotional impact of the crimes on the family. This is precisely the type of evidence permitted by the Court's decision in *Payne,* 501 U.S. at 817, 111 S.Ct. at 2604, 115 L.Ed.2d at 730. Rhines is therefore incorrect when he asserts that victim impact evidence may not include testimony about the victim's personal characteristics.

Additionally, the information contained in the statement was relevant to the jury's sentencing decision. As noted by the *Payne* court, assessment of the harm caused by a criminal act is an important factor in determining the appropriate punishment. 501 U.S. at 819, 111 S.Ct. at 2605, 115 L.Ed.2d at 731. "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." 501 U.S. at 827, 111 S.Ct. at 2609, 115 L.Ed.2d at 736.

Furthermore, the probative value of the victim impact statement was not substantially outweighed by the danger of unfair prejudice. *See* SDCL 19-12-3. The brief testimony by Schaeffer's mother came after Rhines' sisters testified about his upbringing and good qualities, their love for him, and the negative effect his death would have on their family. To paraphrase *Payne,* the victim impact statement "illustrated quite poignantly some of the harm that [Rhines'] killing had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant." 501 U.S. at 826, 111 S.Ct. at 2609, 115 L.Ed.2d at 736. We therefore hold that the trial court did not abuse its discretion in admitting the statement read by Schaeffer's mother.

ISSUE 9.

Did the trial court err in its instructions to the jury regarding the definition of "depravity of mind" for purposes of imposing the penalty of death?

The Eighth and Fourteenth Amendments to the United States Constitution prohibit state sentencing systems that cause the death penalty to be wantonly and freakishly imposed. *Lewis v. Jeffers,* 497 U.S. 764, 774, 110 S.Ct. 3092, 3099, 111 L.Ed.2d 606, 618 (1990).

> [I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates standardless sentencing discretion. It must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death.

Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398, 406 (1980) (Stewart, J., plurality opinion) (citations and quotations omitted).

"A State's definitions of its aggravating circumstances – those circumstances that make a criminal defendant 'eligible' for the death penalty – therefore play a significant role in channeling the sentencer's discretion." *Lewis,* 497 U.S. at 774, 110 S.Ct. at 3099, 111 L.Ed.2d at 619. To satisfy constitutional mandates, an aggravating circumstance must meet two basic requirements. First, it "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant,* 462 U.S. at 877, 103 S.Ct. at 2742, 77 L.Ed.2d at 249-50. Second, "the aggravating circumstance may not be unconstitutionally vague." *Tuilaepa,* 512 U.S. at ___, 114 S.Ct. at 2635, 129 L.Ed.2d at 759. A challenged provision is impermissibly vague when it fails to adequately inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with open-ended discretion. *Maynard v. Cartwright,* 486 U.S. 356, 361-62, 108 S.Ct. 1853, 1858, 100 L.Ed.2d 372, 380 (1988).

As noted above, under the South Dakota sentencing statutes, the jury may not recommend a sentence of death unless it finds at least one aggravating circumstance beyond a reasonable doubt. South Dakota includes the following aggravating circumstance in its statutory scheme:

> The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim[.]

SDCL 23A-27A-1(6).[5]

The State alleged "the offense was outrageously or wantonly vile, horrible or inhuman in that it involved . . . depravity of mind." SDCL 23A-27A1(6). In its sentencing instructions to the jury, the trial court defined depravity of mind as follows:

> Depravity of mind is a reflection of an utterly corrupt, perverted, or immoral state of mind *at the time of the murder.* In determining whether the offense of First Degree Murder in this case involved depravity of mind on the part of the Defendant, you may consider the age and physical characteristics of the victim and you may consider the actions of the defendant prior to, *during* and after the commission of the murder. In order to find that the offense of First Degree Murder involved depravity of mind, you must find that the Defendant, as a result of utter corruption, perversion, or immorality, committed torture upon the living victim; or subjected the body of the deceased victim to mutilation or serious disfigurement; *or relished the murder; or inflicted gratuitous violence upon the victim; or the senselessness of the crime; or the helplessness of the victim. If acts occurring after the death of the victim are relied upon by the state to show depravity of mind of the Defendant, such acts must be shown to have occurred so close to the time of the victim's death, and must have been of such a nature, that the*

[5] In 1995, the legislature added the following sentence to SDCL 23A-27A-1(6): "Any murder is wantonly vile, horrible, and inhuman if the victim is less than thirteen years of age." 1995 S.D.Sess.L. ch. 132.

> *inference can be drawn beyond a reasonable doubt that the depraved state of mind of the murderer existed at the time the fatal blows were inflicted upon the victim.* (Emphasis added.)

Rhines submitted an alternative definition of depravity of mind that did not include the italicized language. The trial court rejected this instruction. Rhines contends the trial court's lengthier definition of depravity of mind was so vague and overbroad as to violate the "cruel and unusual punishment" clause of the Eighth Amendment and the due process guarantees of the Fourteenth Amendment to the United States Constitution.

Rhines correctly notes there are essentially six separate definitions of depravity of mind in the trial court's instructions. They are that: (1) the defendant committed torture upon the living victim; (2) the defendant subjected the body of the deceased victim to mutilation or serious disfigurement; (3) the defendant relished the murder; (4) the defendant inflicted gratuitous violence upon the victim; (5) the senselessness of the crime; or (6) the helplessness of the victim. He specifically objects to the inclusion of the last two phrases, which ask the jury to consider the "senselessness of the crime" or the "helplessness of the victim" as distinct definitions of depravity of mind. Rhines argues virtually every murder satisfies these definitions. He reasons the jury's finding of depravity of mind was likely based on these vague and overbroad phrases, since the other factors listed in the instruction did not apply. Rhines urges reversal of the death sentence for this reason.

There is little doubt that the language of SDCL 23A-27A-1(6), by itself, is vague and overbroad. In *Godfrey,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398, the Court

considered a provision identical to South Dakota's "outrageously or wantonly, vile, horrible or inhuman" circumstance. The trial court in *Godfrey* simply quoted the aggravating circumstance in its instructions to the jury and provided no additional definitions or explanations concerning this aggravating factor. 446 U.S. at 426, 100 S.Ct. at 1764, 64 L.Ed.2d at 405. The jury found beyond a reasonable doubt that the two murders committed by the defendant were "outrageously or wantonly vile, horrible and inhuman" and imposed the penalty of death. 446 U.S. at 426, 100 S.Ct. at 1764, 64 L.Ed.2d at 405. The Georgia Supreme Court affirmed the sentence, without applying any limiting construction to the aggravating circumstance. 446 U.S. at 432, 100 S.Ct. at 1767, 64 L.Ed.2d at 408-09. On appeal, the United States Supreme Court invalidated the death sentence. 446 U.S. at 433, 100 S.Ct. at 1767, 64 L.Ed.2d at 409. Justice Stewart, writing for the plurality, condemned the trial court's bare reiteration of the statutory aggravating circumstance in its charge to the jury. 446 U.S. at 428-29, 100 S.Ct. at 1765, 64 L.Ed.2d at 406-07. He reasoned that the statutory provision, by itself, failed to give the jury adequate guidance in imposing the death penalty and therefore created the likelihood of an arbitrary and capricious result. 446 U.S. at 428-29, 100 S.Ct. at 1765, 64 L.Ed.2d at 406-07; *see also Espinosa v. Florida,* 505 U.S. 1079, 1080-82, 112 S.Ct. 2926, 2927-28, 120 L.Ed.2d 854, 858-59 (1992) (stating simple charge to jury that murder was "especially wicked, evil, atrocious or cruel" did not satisfy constitutional requirements); *Maynard,* 486 U.S. at 363-64, 108 S.Ct. at 1859, 100 L.Ed.2d at 382 (invalidating "especially heinous, atrocious, or cruel" aggravating factor where no additional limiting instruction was given).

Finding the statutory language is vague and overbroad, as the *Godfrey* Court did, does not necessarily establish a constitutional violation. *Walton,* 497 U.S. at 653-54, 110 S.Ct. at 3057, 111 L.Ed.2d at 528. If a state court further defines and limits those otherwise vague and overbroad terms so as to provide adequate guidance to the sentencer, then constitutional requirements are satisfied. *Id.* In this case, we hold that the trial court's definition of depravity of mind does not meet these mandates.

In *State v. Palmer,* 224 Neb. 282, 399 N.W.2d 706, 731-32 (1986), *cert. denied,* 484 U.S. 872, 108 S.Ct. 206, 98 L.Ed.2d 157 (1987), the Nebraska Supreme Court approved a definition for "exceptional depravity" that is nearly identical to the "depravity of mind" definition given in this case. The *Palmer* court devised the following limiting instruction:

> [I]n determining whether the death penalty may be imposed, we hold that "exceptional depravity" in a murder exists when it is shown, beyond a reasonable doubt, that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim.

Id.

In a subsequent appeal challenging the validity of the "exceptional depravity" circumstance, the Eighth Circuit Court of Appeals rejected the Nebraska Supreme Court's limiting instruction. *Moore v. Clarke,* 904 F.2d 1226, 1232-33 (8th Cir.1990), *reh'g denied,* 951 F.2d 895 (8th Cir.1991), *cert. denied, Clarke v. Moore,* 504 U.S. 930, 112 S.Ct. 1995, 118 L.Ed.2d 591 (1992). The court reasoned

that "senselessness of the crime" and "helplessness of the victim" were vague criteria that failed to adequately guide the sentencer's discretion. 904 F.2d at 1232. The court wrote:

> All murder victims could be characterized as "helpless" as evidenced by the fact that they were murdered . . . . "[H]elplessness" is too broad to be useful. Furthermore, . . . "senselessness of the crime" has no objective meaning. If senselessness of the crime were sufficient to permit a death penalty, virtually all murderers would be on death row.

Id. at 1231-32.

Arizona courts have similarly disapproved "senselessness of the crime" or "helplessness of the victim" as an independent measure of depraved conduct. *State v. Johnson,* 147 Ariz. 395, 710 P.2d 1050, 1056 (1985) (holding the senselessness of the killing in itself is not enough to satisfy the "especially heinous, or depraved" aggravating circumstance). *State v. Smith,* 146 Ariz. 491, 707 P.2d 289, 301 (1985) (ruling that absent additional aggravation, neither the senselessness of the crime nor the helplessness of the victim can alone make the offense especially heinous or depraved). *See also State v. White,* 395 A.2d 1082, 1090 (Del.1978) (holding the defenselessness of the victim is an unconstitutionally vague aggravating circumstance). We therefore hold that the depravity of mind circumstance, as limited by the trial court's instruction, did not adequately channel the sentencer's discretion as required by the state and federal constitutions. The effect of our holding is considered later in this opinion.

ISSUE 10.

Did the trial court err in its instructions to the jury regarding SDCL 23A-27A-1(3), which permits the imposition of the death penalty if "the defendant committed the offense for himself or another, for the purpose of receiving money or any other thing of monetary value"?

The State alleged, as an aggravating circumstance, that Rhines committed the murder for himself for the purpose of receiving money. SDCL 23A-27A-1(3). The trial court instructed the jury in pertinent part:

> Before you may find that this aggravating circumstance exists in this case, you must find, beyond a reasonable doubt, that each of the following elements of this aggravating circumstance are proven by the evidence:
>
> 1. That the Defendant committed the murder for himself; and
>
> 2. That he committed the murder for the purpose of receiving money.

Rhines had proposed a jury instruction which would have further defined the elements of this circumstance with the following language:

> It is not sufficient if you merely conclude that the murder was committed during the course of the commission of a burglary, or that the murder was committed only to enable the defendant to retain possession of money already obtained.

The trial court refused this proposed instruction.

In addition to the pecuniary gain circumstance, the State also alleged that the offense "was committed for the

purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another." SDCL 23A-27A-1(9). Rhines does not dispute that he murdered Schaeffer to cover up Rhines' identity as the burglar and assailant so as to satisfy this aggravating circumstance. However, he contends the aggravating circumstance of "murder for the purpose of receiving money" should not apply, because (1) aggravating circumstances should not overlap so that the same facts can satisfy more than one circumstance; (2) the receipt of money was a result, rather than a cause, of Schaeffer's murder; (3) the murder was not part of a larger preexisting plan to obtain the money; and (4) Rhines had possession of the money before Schaeffer arrived, so the murder was not necessary to get the money.

We reject Rhines' assertions of error. First, we do not agree that the sentencer is restricted to finding only one motive for capital murder. The jury may properly consider and find two conceptually distinct aggravating circumstances. Here, the State alleged that Rhines killed Schaeffer to silence a witness and to receive money – two separate motives for murder which could exist independent of one another.

Second, we do not agree that the facts fail to satisfy the pecuniary gain circumstance for any of the reasons listed by Rhines. Our review of the evidence demonstrates that Rhines did not have possession of all of the money when he killed Schaeffer and that obtaining this money was a motive for the murder. As an employee of Dig'Em Donuts, Schaeffer was responsible for collecting money from the West Main Street store and transporting it to the other Dig'Em Donut shops in the area. He was regarded as a trusted employee. It is reasonable to infer that Schaeffer

would not have passively permitted Rhines to take the money without attempting to contact the police or otherwise stop the theft. By murdering Schaeffer, Rhines not only silenced a witness, he also facilitated receipt of the money. Additionally, although Rhines may not have intended to kill anyone when he entered the shop, the evidence suggests his intentions changed once he heard someone entering the store. Detective Allender testified that Rhines "was beginning to take the money" when he heard the door to the shop being opened. He retrieved his knife and waited behind the office door. Importantly, he did not wait until Schaeffer had seen or identified him. After explaining to the interrogating officers how he had stabbed and bound his victim, Rhines told them of his continued theft of the store:

> Rhines: I went back in the office and finished getting, finished getting what money I could find. About $1,700. Actually about um, about, oh probably 16, 15-1600 out of there. Change fund, basically.
>
> Allender: Yeah. And then
>
> Rhines: Cleaned out the change fund on the wall. Went over, used the phone . . . .

Based on the evidence at trial, we cannot conclude that Rhines had possession of all of the stolen money prior to the killing or that the theft was simply a result rather than a cause of Schaeffer's death.

ISSUE 11.

Was the evidence insufficient to support the jury's finding that Rhines tortured Schaeffer?

The jury found that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved the torture of Schaeffer. Rhines disputes this finding, arguing the evidence presented at trial was insufficient to show beyond a reasonable doubt that he tortured his victim. He notes the fact Schaeffer suffered pain or anticipated the prospect of death is not sufficient, because torture requires the intentional infliction of pain beyond that necessary to cause death. He claims the wounds inflicted on Schaeffer were designed to cause death, not unnecessary pain, and any suffering experienced by Schaeffer was incident to death.

When reviewing the sufficiency of the evidence, we must consider the evidence in the light most favorable to the verdict. *State v. Buller,* 484 N.W.2d 883, 889 (S.D.1992) (citing *State v. Ashker,* 412 N.W.2d 97, 105 (S.D.1987)), *cert. denied,* 506 U.S. 887, 113 S.Ct. 248, 121 L.Ed.2d 181 (1992). The jury's verdict will not be set aside if the evidence and all favorable inferences that can be drawn from it support a rational theory of guilt. *Id.* (citing *Ashker,* 412 N.W.2d at 105; *State v. Andrews,* 393 N.W.2d 76, 80 (S.D.1986)).

According to Rhines' statements to police, he was burglarizing Dig'Em Donuts when Schaeffer unexpectedly entered the store. Schaeffer came into the office area of the store and Rhines stabbed him in the abdomen. Schaeffer fell down, thrashed about, and screamed Rhines' name. Rhines stabbed Schaeffer again in the back, piercing his left lung. Rhines then walked Schaeffer out of the office

into the storeroom. Rhines could hear air whistling out of the wound in Schaeffer's back. As Rhines took Schaeffer to the storage area, Schaeffer said, "No, don't. I won't tell." Schaeffer also asked Rhines to call an ambulance for him. Rhines told Allender he thought, "Yeah, right, I am going to call you an ambulance, you bet." Rhines observed that Schaeffer became passive as though he realized he was going to die. Rhines seated Schaeffer on a pallet in the storeroom. He placed Schaeffer's head between his knees and thrust the knife into the base of his skull. Rhines claims Schaeffer continued to breathe and his arms were moving, so he tied Schaeffer's hands behind him. Rhines estimated that Schaeffer's breathing continued for approximately two minutes after inflicting the final knife wound.

A forensic pathologist, Dr. Donald Habbe, testified at the trial. He opined that the first stab wound would not have been fatal to Schaeffer, but would have caused pain and difficulty breathing. Dr. Habbe stated the second stab wound punctured the left lung and would have the same painful effects, with increased difficulty breathing. He also testified that air could possibly whistle through the back of the wound. According to Dr. Habbe, the combination of the first and second stab probably would not have been fatal. The final stab wound cut into Schaeffer's brain stem. Dr. Habbe opined that death would be "near instantaneous." He opined that Schaeffer may have shown some short involuntary movements in his hands and arms after the infliction of the last wound. He stated that he could not determine whether or not Schaeffer's hands were tied before or after the final stab wound to Schaeffer's neck. He did note that the rope around Schaeffer's wrists was tied

very tightly, and that there were abrasions along Schaeffer's left and right wrists.

Under the South Dakota capital sentencing statutes, the jury may not recommend a sentence of death unless it finds at least one aggravating circumstance beyond a reasonable doubt. One aggravating circumstance alleged by the State was that "the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture." SDCL 23A-27A-1(6). In its instructions to the jury, the trial court defined torture as follows:

> Torture occurs when a living person is subjected to the unnecessary and wanton infliction of severe physical or mental pain, agony, or anguish. Besides serious abuse, torture includes serious psychological abuse of a victim resulting in severe mental anguish to the victim in anticipation of serious physical harm. You would not be authorized to find that the offense of First Degree Murder involved torture simply because the victim suffered pain or briefly anticipated the prospect of death. Nor would acts committed upon the body of a deceased victim support a finding of torture. In order to find that the offense of First Degree Murder involved torture, you must find that the Defendant intentionally, unnecessarily, and wantonly inflicted severe physical or mental pain, agony or anguish upon a living victim.

Rhines correctly observes that the trial court's instructions list two essential elements for a finding of torture: (1) the unnecessary and wanton infliction of severe pain, agony, or anguish; and (2) the intent to inflict such pain, agony or anguish. Our review of the evidence shows that both of these elements were satisfied. "Unnecessary pain" implies suffering in excess of what is required to accomplish the murder. *State v. Ramseur,* 106 N.J. 123, 524 A.2d 188, 229

(1987) (citing *State v. Sonnier,* 402 So.2d 650, 658-60 (La.1981), *cert. denied,* 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983)). The defendant who intends to kill his victim instantly or painlessly does not satisfy this requirement, nor does the defendant who only intended to cause pain that is incident to death. *Ramseur,* 524 A.2d at 229-30.

After Rhines inflicted the second non-fatal stab wound, he did not swiftly proceed to end Schaeffer's life. Instead, he brought Schaeffer to his feet and walked him to the storeroom. During this time, Schaeffer begged for his life and asked for medical help. Rhines ignored his pleas. He seated him on a pallet and arranged his body for what Rhines referred to as the *"coup de grace."* Rhines remarked that during this time Schaeffer became passive and seemed to acknowledge his impending death. We cannot agree that Schaeffer's mental and physical anguish during this time was simply pain incident to his death.

Furthermore, one can reasonably infer from the evidence that Rhines bound Schaeffer's hands before he inflicted the third fatal stab wound. Rhines told interrogating officers that he tied Schaeffer's wrists because his breath was whistling out of the wound in his back. However, when the interrogating officers questioned Rhines about the possibility that Rhines bound Schaeffer before the fatal wound to his neck, Rhines' responses were evasive and nonsensical. Furthermore, Dr. Habbe testified that the whistling sound of Schaeffer's breath was consistent with Schaeffer's back wound, but that death after the third wound to the neck would have been "near instantaneous." Further, Dr. Habbe noted abrasions on Rhines' wrists, and the jury could reasonably infer that these

marks were caused or exacerbated by Schaeffer's agonized struggle before his death.

The evidence also shows that Rhines possessed the necessary intent for a finding of torture. When Schaeffer pleaded with Rhines for his life, Rhines did not tell officers of his desire to quickly end his victim's life. Instead, Rhines described his own sarcastic and scornful attitude toward Schaeffer's suffering. Rhines also stated that when he believed Schaeffer had survived the third stab wound, he tied his victim's hands and left him to die. This evidence supports a finding that Rhines intended to cause unnecessary pain to his victim.

ISSUE 12.

Does the jury's consideration of an invalid aggravating circumstance require reversal of the death sentence?

In Rhines' case, the jury found four statutory aggravating circumstances. The jury determined: (1) the offense was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest under SDCL 23A-27A-1(9); (2) the offense was committed for the purpose of receiving money under SDCL 23A-27A-1(3); (3) the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture under SDCL 23A-27A-1(6); and (4) the offense was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind, also under SDCL 23A-27A-1(6). Rhines did not challenge the jury's finding that he committed the offense for the purpose of avoiding lawful arrest. Similarly, we have rejected Rhines' claims of error regarding the torture and pecuniary gain circumstances. However, we have concluded that the

depravity of mind circumstance, as defined by the trial court, is constitutionally invalid.

Rhines claims the invalidity of one of the aggravating circumstances found by the jury requires reversal of his death sentence. Alternatively, he argues the Court may uphold the death sentence only if the jury still would have imposed the death sentence without the invalid factors. He alleges the jury's decision to impose the death penalty was a result of the multiple number of aggravating circumstances that were found. Because the invalid aggravating circumstance cannot be excised from the jury's sentence of death, he claims the sentence must be reversed.

In *Zant,* the Court considered whether a defendant's death sentence must be vacated when one of the three statutory aggravating circumstances found by the jury was subsequently held to be invalid by the Georgia Supreme Court. 462 U.S. at 889, 103 S.Ct. at 2748, 77 L.Ed.2d at 257. The Court held that the invalidity of one aggravating circumstance did not require reversal of the death sentence. The Court stressed various factors that were important to its decision. First, the Court noted that the invalid aggravating circumstance did not implicate expressive activity that is protected by the First Amendment or include factors that are totally irrelevant to the sentencing process, such as the race, religion, or political affiliation of the defendant. 462 U.S. at 885, 103 S.Ct. at 2747, 77 L.Ed.2d at 255. Nor did the circumstance involve conduct that should militate in favor of a lesser penalty, such as the defendant's mental illness. 462 U.S. at 885, 103 S.Ct. at 2747, 77 L.Ed.2d at 255. Second, under Georgia law, aggravating circumstances simply identified those offenses that qualify as capital crimes, and the presence of only one circumstance was sufficient to permit

consideration of the death penalty. 462 U.S. at 876-77, 103 S.Ct. at 2742, 77 L.Ed.2d at 249. Third, the same evidence relevant to the invalid circumstance was also admissible for purposes of ruling on the valid aggravating factors. 462 U.S. at 887-89, 103 S.Ct. at 2748-49, 77 L.Ed.2d at 256-57. Fourth, the Georgia death penalty statutes did not instruct the jury to weigh aggravating circumstances and mitigating circumstances against each other in deciding whether to impose a death sentence. 462 U.S. at 890, 103 S.Ct. at 2750, 77 L.Ed.2d at 258. Nor was the jury otherwise instructed to place any particular weight on the number of aggravating circumstances found. 462 U.S. at 891, 103 S.Ct. at 2750, 77 L.Ed.2d at 258. Finally, Georgia law mandated appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality. 462 U.S. at 890, 103 S.Ct. at 2749, 77 L.Ed.2d at 258.

Importantly, as noted earlier, South Dakota's capital sentencing scheme is modeled after Georgia's death penalty statutes. All of the procedural safeguards emphasized in *Zant* are also present in our capital punishment law. First, the depravity of mind circumstance did not encompass conduct that is constitutionally protected, personal characteristics of the defendant that are totally irrelevant to the sentencing process, or conditions that should favor a lesser penalty. Second, aggravating circumstances serve only to narrow the class of offenders eligible for the death penalty, and the existence of only one such circumstance is sufficient to warrant consideration of capital punishment. Third, all of the evidence relevant to the "depravity of mind" circumstance was also properly admitted for purposes of deciding the existence of other valid aggravating factors. Fourth, our statutes do not

require the jury to weigh aggravating circumstances against mitigating factors, and the jury was not instructed to consider the specific number of aggravating factors in deciding whether to render a death sentence. Finally, SDCL 23A-27A-12 mandates this Court to consider whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. Therefore, in accordance with the Supreme Court's ruling in *Zant,* we hold the invalidity of the "depravity of mind" circumstance does not so taint the penalty proceedings as to mandate reversal of Rhines' death sentence.

ISSUE 13.

Was Rhines' death sentence imposed under the influence of passion, prejudice, or other arbitrary factors?

Rhines contends the jury considered irrelevant or unfairly prejudicial matters when imposing the death penalty. He claims the jury's note to the judge about life imprisonment demonstrates this bias. He specifically focuses on questions about whether prison conditions might allow "distraction from his punishment" and whether he might qualify for work release from prison.[6]

Rhines also contends the trial court failed to adequately respond to the jury's improper concerns. As noted above, the trial court sent the following response to the jury:

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[6] Rhines also reiterates his claim that some of the jury's questions demonstrate a bias against homosexuality. Having previously addressed this allegation, we need not revisit it here.

> Dear Jurors: I acknowledge your note asking questions about life imprisonment. All the information I can give you is set forth in the jury instructions.

The trial court refused to give an additional instruction proposed by Rhines:

> You are further instructed, however, that you may not base your decision on speculation or guesswork.

Rhines contends that, by failing to give this instruction, the court improperly permitted the jury to speculate about the nature of life imprisonment.

1. Passion, prejudice or other arbitrary factors.

Once the jury has found the existence of an aggravating circumstance beyond a reasonable doubt, our capital sentencing scheme gives jurors broad discretion in deciding whether to impose life imprisonment or a death sentence. *See, e.g., Tuilaepa,* 512 U.S. at ___, 114 S.Ct. at 2636, 129 L.Ed.2d at 761. Indeed, prior to sentencing deliberations, the jury was appropriately instructed: "You may fix the penalty at life imprisonment, if you see fit to do so, for any reason satisfactory to you, or without any reason."

In this context, the jury's questions about work release and "distraction from punishment" do not show that they considered irrelevant or arbitrary factors in rendering a verdict. Their questions directly relate to conditions of confinement under a sentence of life without parole. Prison life was an appropriate topic for discussion when weighing the alternatives of life imprisonment and the death penalty.

2. Trial court's response.

Rhines contends the trial court erred in failing to additionally advise the jury to avoid speculation and guesswork. We find no error. The decision whether to provide further instruction to the jury rests within the sound discretion of the trial court. *Floody,* 481 N.W.2d at 250 (citing *State v. Holtry,* 321 N.W.2d 530, 531 (S.D.1982)).

Although other courts have responded to similar inquiries by instructing jurors to refrain from speculation, *People v. Hovey,* 44 Cal.3d 543, 244 Cal.Rptr. 121, 145-46, 749 P.2d 776, 800 (1988), *cert. denied,* 488 U.S. 871, 109 S.Ct. 188, 102 L.Ed.2d 157 (1988); *People v. Stankewitz,* 51 Cal.3d 72, 270 Cal.Rptr. 817, 842-43, 793 P.2d 23, 48-49 (1990), *cert. denied,* 499 U.S. 954, 111 S.Ct. 1432, 113 L.Ed.2d 483 (1991), the trial court's decision to forego such an instruction was not an abuse of discretion. First, the proposed instruction to avoid speculation and guesswork could inadvertently chill the jury's broad discretion to fix the penalty at life imprisonment "for any reason . . . or without any reason." Second, the instructions given by the trial court fully and accurately advised the jurors of the law governing the case. We can discern no error in simply referring the jurors to these instructions. "'If the court in the exercise of sound discretion concludes that information or further instructions are not required, it may properly refuse such a request.'" *Holtry,* 321 N.W.2d at 531 (quoting *State v. Weinandt,* 84 S.D. 322, 327, 171 N.W.2d 73, 77 (1969)).

ISSUE 14.

Based on the appellate review mandated by SDCL 23A-27A-12, was Rhines' sentence of death lawfully imposed?

In every case where the death penalty is imposed, this Court is required to conduct an independent review of the sentence. SDCL 23A-27A-12. We must determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 23A-27A-1; and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

SDCL 23A-27A-12.

We begin our review by determining whether the evidence supports any of the aggravating circumstances found by the jury. Rhines does not dispute that he committed the murder to avoid being arrested, thereby satisfying aggravating circumstance SDCL 23A-27A-1(9); there is substantial evidence in the record to support this finding. When describing the murder to Detective Allender and Deputy Sheriff Bahr, Rhines remarked, "leave no witnesses." He also referred to being "caught in the act." When discussing his decision to tie Schaeffer's hands, Rhines remarked, "I just don't want somebody to stand up in the middle of – or call anybody and go dial 911." Furthermore, we have previously concluded the offense was committed for the purpose of receiving money under SDCL

23A-27A-1(3) and the offense involved torture which was wantonly vile, horrible, or inhuman under SDCL 23A-27A-1(6). Clearly, Rhines was eligible for the death penalty.

Nor can we conclude the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We have rejected Rhines' claims that inadmissible evidence was considered by the jury and that the jury permitted irrelevant facts to taint its verdict. We cannot discern any independent basis for invalidating the jury's sentence. Although Rhines presented mitigating evidence concerning his difficult youth and loving family, the decision to impose the death penalty in spite of this evidence was not arbitrary. Rhines brutally murdered Donnivan Schaeffer so he could steal less than $2,000 in cash and escape responsibility for his crime. The law permits mercy, but does not require it.

Finally, we consider whether Rhines' death sentence is excessive or disproportionate to the penalty imposed in similar South Dakota cases. SDCL 23A-27A-12(3) is patterned after the proportionality review provisions in the Georgia capital punishment statutes. As the United States Supreme Court observed in *Gregg*, provision for proportionality review:

> substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

428 U.S. at 206, 96 S.Ct. at 2940, 49 L.Ed.2d at 893.

As for the mechanics of proportionality review, Rhines argues the pool of similar cases for proportionality review should encompass all homicide cases that were prosecuted or could have been prosecuted under the State's current capital punishment scheme. He reasons that prosecutorial discretion is an important factor that this Court must consider when ruling on proportionality. The State argues the pool of similar cases should be limited to those South Dakota cases proceeding to the capital punishment phase, regardless of whether a death sentence was actually imposed. There are seven other South Dakota cases that have proceeded to death penalty deliberations.

We conclude that similar cases for purposes of SDCL 23A-27A-12(3) are those cases in which a capital sentencing proceeding was actually conducted, whether the sentence imposed was life or death. "[B]ecause the aim of proportionality review is to ascertain what other capital sentencing authorities have done with similar capital murder offenses, the only cases that could be deemed similar ... are those in which imposition of the death penalty was properly before the sentencing authority for determination." *Tichnell v. State,* 297 Md. 432, 468 A.2d 1, 15-16 (1983), *cert. denied,* 466 U.S. 993, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984). *Accord, Flamer v. State,* 490 A.2d 104, 139 (Del.1983), *cert. denied,* 474 U.S. 865, 106 S.Ct. 185, 88 L.Ed.2d 154 (1985).

Since the enactment of South Dakota's current death penalty statute in 1979, eight capital sentencing proceedings have taken place. In six of those cases, the jury imposed life sentences. In Rhines' case and one other, the jury returned a verdict of death. We will briefly set forth the facts of each of these other cases so as to provide a foundation for our review.

State v. Adams

Howard Adams and Jimmy Lee Boykin kidnapped, robbed and murdered DuWayne Jensen, a stranger who was delivering newspapers early in the morning on June 19, 1986. Jensen's jaw and windpipe had been fractured and both of his eyes were blackened. The cause of his death was multiple stab wounds. The State sought the death penalty, alleging the offense was committed for the purpose of receiving money or any other thing of monetary value and the offense was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim. The jury only found the aggravated battery circumstance and sentenced Adams to life imprisonment. Mitigating circumstances included Adams' deprived childhood, a history of alcohol abuse, and use of alcohol immediately prior to the crime.

State v. Bittner

On March 20, 1982, two police officers responded to a complaint that Steven Bittner had physically abused his girl friend in the home the couple shared. As the officers proceeded to the upstairs portion of the house, Bittner bounded down the stairs and stabbed both officers. One of the officers died as a result of his injuries.

The State sought the death penalty, alleging one aggravating circumstance – that the offense was committed against a law enforcement officer while in the performance of his duties. The jury sentenced Bittner to life imprisonment, without finding the existence of any statutory aggravating circumstances. Bittner established various mitigating circumstances, including abuse and neglect as a child, a history of alcohol or drug abuse, use of

alcohol immediately prior to the crime, and a disavowal of any intent to deliberately kill the officer.

State v. Helmer

The State alleged that William J. Helmer killed an acquaintance, Randy Dixon, by shooting Dixon in the head. The State also claimed that, after killing Dixon, Helmer cut off Dixon's head and hands with an axe. Helmer presented evidence that he had experienced mental problems for a number of years. Testimony indicated that Helmer suffered from post-traumatic stress disorder at the time of Dixon's murder. There was also evidence indicating Dixon had been abusive toward Helmer and may have stolen property from Helmer.

The State sought the death penalty, asserting the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim and the offense was committed for the purpose of receiving money or anything of monetary value. The jury convicted Helmer of first-degree murder and sentenced Helmer to life imprisonment.

State v. Moeller

The State alleged Moeller anally and vaginally raped a nine-year-old girl and stabbed her to death. The State sought the death penalty, claiming the offense was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim. The jury convicted Moeller of rape and first-degree murder. The jury also found the existence of the aggravated battery circumstance and imposed a sentence of death.

State v. Smith

During the course of a bank robbery, James Elmer Smith shot a woman who failed to follow his order to lie down on the floor. The woman died within a few minutes of receiving the gunshot wound. The State sought the death penalty, alleging three aggravating circumstances: (1) the defendant knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person; (2) the offense was committed for the purpose of receiving money or any other type of monetary value; and (3) the offense was committed by a person in, or who has escaped from, the lawful custody of a law enforcement officer or place of lawful confinement. The jury convicted Smith of first-degree murder and returned a verdict of life imprisonment.

State v. Swallow

Accompanied by two others, Edwin Swallow went to the home of Conrad Wilson, an illicit drug dealer. A shoot-out ensued. Wilson was found, barely alive, on the porch of the house. He eventually died of his injuries. Wilson's seventeen-year-old daughter, who was not involved in the drug trade, was found dead from a single shotgun blast.

The State sought the death penalty against Swallow, alleging the murder of Wilson's daughter was committed by a person who had a substantial history of serious assaultive criminal convictions and was committed for the purpose of receiving money or any other thing of monetary value. Mitigating evidence showed Swallow was twenty-two years old, had a history of drug abuse, and that a co-perpetrator had received a sentence of sixty-five years.

There was also testimony indicating Wilson initiated the shootout by firing at Swallow's companions.

The jury convicted Swallow of one count of first-degree manslaughter for the death of Wilson and one count of first-degree murder for the death of Wilson's daughter. The judge imposed a life sentence for the manslaughter conviction. The jury imposed a life sentence without possibility of parole for the first-degree murder conviction, without indicating whether the aggravating circumstances were satisfied.

State v. Waff

David Waff killed Russell Keller in exchange for a payment of $1500 from Keller's business partner. Waff had shot Keller once in the head and stabbed him eight times. The State sought the death penalty, asserting the murder was committed for the purpose of receiving money or other things of monetary value and the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. The jury found Waff guilty of first-degree murder and sentenced him to life imprisonment.

The law demands individualized sentencing. *Tuilaepa,* 512 U.S. at ___, 114 S.Ct. at 2635, 129 L.Ed.2d at 760. The jury's verdict in any capital case is necessarily premised on the unique facts before it. Yet, all defendants facing the death penalty are entitled to fairness and reasonable consistency in its imposition. *State v. Bey,* 137 N.J. 334, 645 A.2d 685, 689 (1994), *cert. denied,* 513 U.S. 1164, 115 S.Ct. 1131, 130 L.Ed.2d 1093 (1995). "'[A] death sentence is comparatively excessive if other defendants with similar characteristics generally receive sentences other than

death for committing factually similar offenses in the same jurisdiction.'" *Id.* (quoting *State v. Marshall,* 130 N.J. 109, 613 A.2d 1059, 1070 (1992)).

A dissenting opinion implies that Rhines' sentence is disproportionate because he is one of only two defendants to have received a verdict of death. We respectfully suggest this reasoning is flawed. First, the fact that Rhines is among the first to receive a death sentence does not signify that his sentence is disproportionate. Otherwise, the death penalty itself would be nullified. Second, a death sentence should not be invalidated simply because a jury determined that another defendant, who committed an analogous crime, deserved mercy. Proportionality review focuses not only on the crime, but also on the defendant. SDCL 23A-27A-12(3). *See State v. Benn,* 120 Wash.2d 631, 845 P.2d 289, 317 (1993) (quoting *State v. Lord,* 117 Wash.2d 829, 822 P.2d 177, 223 (1991)) ("Simply comparing numbers of victims or other aggravating factors may superficially make two cases appear similar, where in fact there are mitigating circumstances in one case to explain either a jury's verdict not to impose the death penalty or a prosecutor's decision not to seek it."), *cert. denied,* 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993).

We conclude the death sentence is not excessive or disproportionate in Rhines' case. First, we note Rhines' offense involved the existence of three separate aggravating circumstances. Only one other case, *State v. Smith,* 477 N.W.2d 27 (S.D.1991), alleged the presence of three aggravating factors. Marked distinctions between Rhines' case and *Smith* justify the juries' different verdicts. In *Smith,* the victim died quickly from a single gunshot delivered swiftly and unexpectedly by Smith. In contrast, Schaeffer did not die quickly from a single wound. Rhines

first stabbed him in the stomach, which caused Schaeffer to collapse to the floor, screaming and writhing in pain. After Rhines pierced Schaeffer's lung with the second thrust of his knife, Schaeffer pleaded for his life. According to Rhines, when he assisted Schaeffer to the storeroom to deliver the "*coup de grace,*" Schaeffer seemed to anticipate his own death. The disparity in suffering endured by victims is an important and legitimate consideration when evaluating the proportionality of a death sentence.

Additionally, the nature of the evidence in this case sets it apart from any other capital case in this state. In the seven other cases where the death penalty was considered, the prosecution's evidence was circumstantial or involved testimony by third-persons who observed the defendant's wrongdoing or who heard inculpatory statements by the defendant. In this case, the jury heard Rhines' own description of his crime. His arrogant and cold-blooded attitude toward his offense was made shockingly apparent in his own words and in his own voice. Rhines described the stabbing of Schaeffer in chilling, clinical detail. He told about Schaeffer "thrashing" and "screaming" after the first stab wound. He said air whistled out of the wound in Schaeffer's back, and called it a "sucking back wound." As to the final death blow, Rhines remarked: "Sat him down and put him basically, his head between his legs and applied the knife to the back of the neck where the skull joins the spinal column. Right in the joint at the spinal column. In kind of upward, up and in . . . . Attempted to reach the small brain . . . " Then Rhines told the officers, " . . . he was still breathing, I didn't know what I had. I've never stabbed anybody to death. I've never stabbed anybody, period. You guys seen anybody get stabbed to death? Know what it takes? Quit fighting very

quickly, but, you don't die very quickly." When the officers told Rhines that a pathologist had suggested Schaeffer might have been tied up before the last stab wound, Rhines stated, "Too bad he wasn't there. To watch." Then Rhines burst into laughter. In explaining Schaeffer's movements after the last wound, Rhines drew an analogy to butchered chickens. Rhines laughed intermittently throughout the first interview, usually in reference to witnesses the officers had not spoken to or items of evidence they had not found. At one point he remarked caustically, "I try not to condescend." During Rhines' lengthy taped confessions, he did not spontaneously express any feeling of remorse for Schaeffer's death. When finally asked, "Are you sorry Donnivan's dead now?" Rhines simply responded, "Yeah." He then proceeded to tell the officers that he wanted to "get off."

Faced with such compelling evidence of the defendant's moral culpability and apparent lack of sincere remorse, we conclude the death sentence imposed on Rhines was neither excessive nor disproportionate to the penalty imposed in similar cases in South Dakota.

Affirmed.

GILBERTSON, J., and JOHNSON, Circuit Judge, concur.

SABERS and AMUNDSON, JJ., dissent.

JOHNSON, Circuit Judge, sitting for KONENKAMP, J., disqualified.

SABERS, Justice (dissenting).

The issue is: Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

For the reasons stated herein, the sentence of death is excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. SDCL 23A-27A-12(3).

SDCL 23A-27A-12 provides the factors to be reviewed by the Supreme Court regarding a death sentence. For the purpose of this case, I will assume that this death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and that the evidence supports the jury's finding of a statutory aggravating circumstance as enumerated in SDCL 23A-27A-1.

However, as indicated above, SDCL 23A-27A-12(3) mandates that the Supreme Court affirmatively determine that this death sentence is neither excessive nor disproportionate to the penalties imposed in similar cases, considering both the crime and the defendant. In fact, unless we affirmatively determine that the death sentence is neither excessive nor disproportionate to the penalties imposed in criminal cases, then, in that event, SDCL 23A-27A-14 requires that "the court shall sentence such person to life imprisonment." That is what must be done here.

Before considering the penalties imposed in similar cases, it is very important to point out that in *Pulley v. Harris,* 465 U.S. 37, 50-51, 104 S.Ct. 871, 879, 79 L.Ed.2d 29, 40-41 (1984), the United States Supreme Court held that the Constitution of the United States does not require proportionality review. In other words, it was not

necessary for the South Dakota Legislature to enact SDCL 23A-27A-12(3) requiring mandatory proportionality review by the South Dakota Supreme Court. I submit that it was a mistake for the South Dakota Legislature to require mandatory proportionality review when it was not required by the United States Constitution. This statement presumes, of course, that the death penalty was desired by the legislature in most murder cases.

Most murders are, for the most part, full of aggravating circumstances and at least for death penalty proponents, more than adequate for capital punishment. However, when our legislature has clearly said that those aggravating circumstances are *not enough,* and that, in addition, there must be mandatory proportionality review by the Supreme Court, it is clear that no death sentence shall be imposed unless we can affirmatively determine that the death sentence is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. In other words, even if we were to conclude that this defendant and this defendant's crime deserves death, we cannot impose it because it is excessive and disproportionate to the penalties imposed in similar cases. That is our task under SDCL 23A-27A-12(3). It did not have to be that way, but it is. The United States Constitution does not require it but the South Dakota Legislature does.

Concerning the mechanics of proportionality review, the majority opinion states:

> Rhines argues the pool of similar cases for proportionality review should encompass all homicide cases that were prosecuted or could have been prosecuted under the State's current capital punishment scheme. He reasons that prosecutorial discretion is

an important factor that this Court must consider when ruling on proportionality. The State argues the pool of similar cases should be limited to those South Dakota cases proceeding to the capital punishment phase, regardless of whether a death sentence was actually imposed. There are seven other South Dakota cases that have proceeded to death penalty deliberations.

The majority opinion promptly proceeds to adopt the State's argument without any consideration of other murder cases and without any reasoned analysis.

It seems clear to me that if proportionality review is to be meaningful, as intended by our legislature, the pool of "similar cases" must include at a minimum *all* reported murder cases. This would present no great difficulty in South Dakota, where the crime of murder is still infrequent, if not uncommon. Generally, we have less than ten reported murder cases per year. Prosecutorial discretion and plea bargaining should be factors for consideration, even if not controlling, and the cases disposed of by those methods should not be *automatically* omitted.[7] At any rate, to limit the pool of "similar cases" to the seven as the majority does is, in itself, arbitrary and unreasonable.

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[7] Consider for a moment the recent "murder for hire" case of Mary K. Ross in Sioux Falls. The man who hired the killing and the two killers received life sentences as a result of pleas despite the fact that she was stabbed numerous times over a substantial period of time. She lived long enough to call the 911 operator to report that she was being killed and that her baby was in the next bedroom.

Several years ago, a young man brutally raped and murdered a nine-year-old Sioux Falls Argus Leader paper girl and received a life sentence.

Under the majority's view, these cases would *never* be considered in its pool of similar cases.

It takes no great memory to recall numerous "similar cases" where the facts and the aggravating circumstances were at least as hideous as in Rhines' case. In fact, the major distinguishing feature in all other cases is that the penalty was life in prison or less, and not death. Consider for a moment, the following cases:

1. *State v. Ashker,* 412 N.W.2d 97 (S.D.1987).

Lewis Ashker and Curt Novaock were convicted of first-degree murder of the death of Jerry Plihal in Delmont. Plihal had struggled with his attackers and had been stabbed numerous times. Plihal's guns were missing, but not found by the authorities.

2. *Jenner v. Leapley,* 521 N.W.2d 422 (S.D.1994).

In 1986, Jackie Sjong was found dead under a bridge near Spearfish, the victim of four bullets fired at close range, from two different weapons. Sjong was "picked up" by Michael Jenner in California and brought to Sturgis for execution because he had "ratted" on a fellow club member.

Michael Jenner and Richard Elliott, members of an "outlaw" motorcycle club, were convicted of first-degree murder and each received a life sentence.

3. *State v. Braddock,* 452 N.W.2d 785 (S.D.1990).

Edward Braddock was convicted of murder and sentenced to life imprisonment for killing Douglas Cramer by shooting him 8 times with an AK-47 assault rifle at the Edgemont city dump. He claimed Cramer owed him money.

4. *State v. Rough Surface,* 440 N.W.2d 746 (S.D.1989).

Donald Rough Surface received life in prison for murder, rape, robbery and assault of his uncle. The

victim's body was found naked, bloody, badly beaten, and burned in the crawl space beneath a grain elevator in Mobridge. The victim had also been raped and robbed.

5. *State v. Bradley,* 431 N.W.2d 317 (S.D.1988).

Jamie Thunder Hawk's body was found in a roadside ditch near Baltic in 1986. Her head had been severed with a knife. There was testimony that she had been abused and tortured over a period of time by Bradley and that on the day of her death, she was kicked, raped and strangled to death. Bradley received life imprisonment.

6. *State v. Miller,* 429 N.W.2d 26 (S.D.1988).

Todd Miller was convicted of murder, kidnapping, possession of ransom money and forgery for the death of his "friend" Michael Kinney near Aberdeen. He received life sentences.

7. *State v. Corder,* 460 N.W.2d 733 (S.D.1990).

Ronald Corder and Harvey Ernst each received a life sentence for the brutal beating of Clifford Hirocke near Vermillion.

8. *State v. Davi,* 504 N.W.2d 844 (S.D.1993).

Scott Davi received life in prison for convictions of murder and rape of his ex-wife, and burglary of her apartment in Sioux Falls. She had been brutally beaten, raped and strangled.

9. *State v. Phillips,* 489 N.W.2d 613 (S.D.1992).

Darlene Phillips received a life sentence in her conviction of conspiracy to commit murder. After several aborted attempts with poison and fire to kill her ex-husband for whom she was caring, she and others smothered him with a pillow in Lemmon.

10. *State v. Henjum,* 1996 SD 7, 542 N.W.2d 760 (S.D.1996).

Finally, as recently as February 27, 1994, in Mitchell, Lawrence Henjum, shot his friend and roommate, Mark Nelson, in the head with a rifle for no apparent reason. The murder charge was dropped to manslaughter, he pled guilty and received forty-five years.

Minimal research discloses approximately 80 reported murder cases since 1978, many of which are as hideous as Rhines' case. *None* of them resulted in a death sentence. *None* of them are even considered in the majority opinion.

Even if the pool of similar cases was limited to the seven cases used by the majority, the facts and aggravating circumstances of *Rhines* are more common than exceptional. Although the specific details vary, the brutality of each killing is similar. In fact, viewed objectively, all of them were hot or cold blooded murders or executions against defenseless victims. The only real distinguishing feature is that all of those murderers received life in prison. Therefore, Rhines' death sentence is disproportionate *and* excessive in comparison.

As stated in the majority opinion: "[A] death sentence is comparatively excessive if other defendants with similar characteristics generally receive sentences other than death for committing factually similar offenses in the same jurisdiction." *State v. Marshall,* 130 N.J. 109, 613 A.2d 1059, 1070 (1992). To paraphrase, Rhines' death sentence is comparatively excessive *because all* other defendants with similar characteristics received sentences other than death for committing factually similar offenses in the same jurisdiction.

Accordingly, it is pure fiction to say that Rhines' death sentence is neither excessive nor disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. Therefore, we have no choice but to reverse and remand because, in these circumstances, the law requires that "the court shall sentence such person to life imprisonment." SDCL 23A-27A-14.

AMUNDSON, Justice (dissenting).

I respectfully dissent on Issue 14, for I believe the majority's comparative proportionality review universe or pool is too restrictive. When I embarked on this mandated review, I felt much like Benjamin N. Cardozo when he stated:

> I was much troubled in spirit in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile . . . . As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.

Benjamin N. Cardozo, *The Nature of the Judicial Process,* 166 (1921).

One of the fundamentals of proportionality review is to avoid "death sentences imposed . . . wantonly or freakishly." *Gregg v. Georgia,* 428 U.S. 153, 224, 96 S.Ct. 2909, 2948, 49 L.Ed.2d 859, 903 (1976) (White, J., concurring).

In order to avoid such a result, a larger pool needs to be used for comparison to ensure we properly perform this ominous task. This maiden voyage provides an opportunity to establish a procedure for evaluating the appropriateness of a death sentence. A court should not lose sight of the fact that the purpose of this review is fairness notwithstanding the nature of the crime.

In *State v. Mercer,* 618 S.W.2d 1, 21 (Mo.1981) (Seiler, J., dissenting) it was noted:

> By "similar cases" is meant similar capital murders, not limited only to those where both death and life imprisonment were submitted to the jury and then affirmed on appeal, whichever way the case went on punishment. The evil deed is the murder and what accompanied it and that, as well as the defendant, is what must be looked at in comparing what one defendant received in punishment under a capital murder charge with what another received. The fact that a capital murder defendant does not get the death penalty or gets a new trial or that the state waived the death penalty in his case or that his case is still pending before us does not mean that we can ignore his case in making our comparison. Once we accept the idea, as we must, that the death penalty cannot be inflicted at random, or arbitrarily or inconsistently, then necessarily we must take into consideration all capital murders we know about.

Our state legislature mandates us to carry out proportionality review. SDCL 23A-27A-12. Since 1979, SDCL 23A-27A-8 has required this court to accumulate the records of all capital felony cases that we deem appropriate. The information available at this time tracks cases from 1981 until 1993. Our records contain forty-eight capital felony cases that we deemed appropriate to accumulate. Beyond

the records assembled in Pierre at this time, there are at least four other cases that could be included in this accumulation.[8] What is the majority's rationale for culling this established pool to seven? Since the legislature has mandated this review, it must be meaningful or the result will be suspect. As Justice Utter stated in his dissent in *State v. Benn,* 120 Wash.2d 631, 845 P.2d 289, 326-27 (1993):

> Without such review, the death penalty, like lightning, will strike some, but not others, in a way that defies rational explanation. The severity of the death penalty, its irrevocability, and our statutory mandate, require us to assess carefully whether the death penalty has been imposed arbitrarily. We cannot, under the statute, simply defer to a jury's sentencing determination.

SDCL 23A-27A-12(3) states that we are to consider both the crime and the defendant when conducting our comparative review, not just that a capital proceeding took place. In South Dakota, only two people since 1979 have been sentenced to death out of at least fifty-two eligible criminals. In conducting comparative proportionality review, if we required a case to be on all fours with the other cases in order for them to be similar, I submit that would be impossible. By using the pool already assembled by this court, it gives notice to the parties involved in the

[8] *State v. Helmer,* 1996 SD 31, 545 N.W.2d 471 (Convicted July 8, 1994. Victim was shot and then decapitated and hands removed.); *State v. Henjum,* 1996 SD 7, 542 N.W.2d 760 (Pleaded guilty to manslaughter in the first degree sometime in 1994. Defendant shot victim with no provocation.); *State v. New,* 536 N.W.2d 714 (S.D.1995) (Convicted May 2, 1994, of second-degree murder. New stated he did not actually murder, just witnessed.); *State v. Larson,* 512 N.W.2d 732 (S.D.1994) (Convicted November 21, 1992, of second-degree murder. Victim shot while driving down Interstate.).

litigation as to what cases will be considered. Then, the litigants can make their argument on this issue based on that pool. Otherwise, a defendant does not find out what are similar cases until the decision is handed down. There is no statute in South Dakota that defines "similar case" nor does any statute provide us with a standard for performing the mandated review. On the other hand, all of the cases which I recommend be included in the pool have one similarity, namely, a wrongful taking of another person's life. By employing such a pool, this court would be proceeding with appropriate care and caution when making a decision involving life or death of a human being.

In conclusion, I might personally feel Rhines has earned the sentence imposed by the jury, but that is not the issue. The issue is whether the death penalty is being imposed uniformly and not arbitrarily. This issue cannot be resolved by only considering cases where capital sentencing proceedings were actually conducted.

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
: SS		SEVENTH
)		JUDICIAL CIRCUIT
COUNTY OF PENNINGTON)		
CHARLES RUSSELL RHINES,)		Civ. No. 96-1070
Petitioner,)		FINDINGS OF FACT,
)		CONCLUSIONS OF
v.)		LAW AND ORDER
)		
DOUGLAS WEBER, Warden)		(Filed Nov. 16, 1998)
of the South Dakota)		
State Penitentiary,)		
)		
Respondent.)		

INTRODUCTION

The above-entitled matter having come on regularly for hearing before this Court on April 6, 1998; the Petitioner appeared in person and by his attorney Michael Hanson; the Respondent being represented by Deputy Attorney General Robert Mayer and Craig M. Eichstadt and Assistant Attorney's General Grant Gormley and Sherri Sundem Wald; the Honorable Merton B. Tice presiding; testimony and exhibits having been duly received by this Court and the Court having taken judicial notice of Seventh Judicial Circuit Court File, Crim. No. 93-81, *State of South Dakota v. Charles Russell Rhines,* and all records and transcripts intended or pertinent thereto; and the foregoing having been considered by the Court; both parties having presented to the Court testimony of witnesses and exhibits; and authorities and/or arguments for both parties having been presented to the Court; this Court then having duly considered all testimony, evidence, arguments, briefs, records, and files contained herein, and the Court having issued a written decision dated October

8, 1998, denying Petitioner's Application for Writ of Habeas Corpus, which opinion hereby is incorporated by reference, now being fully advised does, pursuant to SDCL 15-6-52, hereby make the following:

FINDINGS OF FACT

1. Twenty-two-year-old Donnivan Schaeffer was found murdered on Sunday, March 8, 1992, in the back storeroom of Dig'Em Donuts. Schaeffer had been stabbed in the abdomen, in the upper left back, and in the back of the neck.

2. On July 27, 1992, Defendant was indicted by a Pennington County Grand Jury in Circuit Court for the Seventh Judicial Circuit on one count of Premeditated First Degree Murder, in violation of SDCL 22-16-4; one count of Felony Murder, in violation of SDCL 22-16-4, and one count of Third Degree Burglary, in violation of SDCL 22-32-8. On August 24, 1992, the State filed an habitual offender information against Defendant. The Honorable John K. Konenkamp presided over the trial.

3. On January 23, 1993, Petitioner Charles Russell Rhines (Rhines) was found guilty by a Pennington County jury of premeditated first degree murder and third degree burglary. On January 26, 1993, the same jury returned a sentence of death by lethal injection finding aggravating circumstances to have existed in connection with the death of Schaeffer.

4. Rhines appealed his conviction to the South Dakota Supreme Court which subsequently affirmed the conviction. *State v. Rhines,* 1996 S.D. 55, 548 N.W.2d 415.

5. On December 5, 1996, Rhines filed an Application for Writ of Habeas Corpus. An Amended Second Application for Writ of Habeas Corpus was filed on September 17, 1997. Attorney Michael Hanson was appointed to represent Petitioner.

6. An evidentiary hearing was held on the amended second petition on April 6, 1998, with subsequent testimony of Michael Butler being introduced by way of deposition on June 5, 1998.

7. This Court issued a written Opinion dated October 8, 1998, which denied the amended application and quashed the writ and the contents of which are hereby incorporated by reference herein, as may be applicable.

8. (1) *He never met with two of his three counsel prior to the start of trial. Therefore, he asserts, there was a lack of pretrial preparation.*

This Finding is duplicative of (10) of the Court's memorandum decision, located below at Finding No. 17. As a result, Finding No. 17 is incorporated herein by reference.

In addition, all counsel met with Petitioner prior to trial on a number of occasions. Counsel, having developed a division of labor, left primary contact responsibility with Wayne Gilbert. Meanwhile, Mike Stonefield and Joseph Butler proceeded to address legal matters and investigation. Each of these counsel were skilled, experienced, and conscientious in their representation of Petitioner. There is no evidence to support a lack of preparation. There is no evidence to support any reason to believe that counsel made any legal or tactical errors based upon the unfounded asserted lack of contact.

9. (2) *One of his counsel was depressed and engaged in theft during the course of time that he was representing Rhines.*

There is no evidence to support any belief that this counsel (Wayne Gilbert) failed, in any way, to fully and adequately represent Mr. Rhines. There is absolutely no evidence that would indicate that this situation in any way detracted from the legal services provided by this attorney. The problems of this attorney in no way manifested themselves in the trial of this case.

10. (3) *There was a failure to cross-examine some of the prosecution witnesses.*

This Finding is duplicative of (25) of the Court's memorandum decision, located below at Finding No. 28. As a result, Finding No. 28 is incorporated herein by reference.

In addition, a number of the State's witnesses were people who tied Rhines to the act. However, Rhines defense was not a "who-done-it." it was not disputed that Rhines committed the act. There is no evidence to support any indication that cross-examination of the State's witnesses who were not cross-examined at trial would have been, in any way, helpful to the defense. Choosing not to cross-examine these witnesses was a tactical decision founded upon no potential benefit. Trial counsel could not have done anything more with these witnesses that would have made any difference in this case. *See Sprik v. Class*, 1997 S.D. 134 ¶ 61, 572 N.W.2d 824, 835.

11. (4) *Failure of the lawyers to call witnesses who lived in Rapid City to provide mitigation evidence.*

This Finding is duplicative of (24) of the Court's memorandum decision, located below at Finding No. 27. As a result, Finding No. 27 is incorporated herein by reference.

In addition, the failure of counsel to call witnesses who lived in Rapid City to provide mitigation evidence was clearly a tactical decision by counsel. Counsel necessarily had to be very careful in presenting any mitigation as to Rhines' personal history. Doing so could open up the opportunity for the State to present evidence of Rhines' prior criminal record. There was no evidence to support the belief that there were any Rapid City witnesses available who would have been able to provide favorable mitigation evidence. There is no evidence to support the belief that, even if favorable mitigation evidence was available from Rapid City witnesses, that such evidence would not have opened up the opportunity for the State to present their own evidence of Rhines' prior criminal record.

12. (5) *His counsel, Joseph Butler, advised the jury, that he supported the death penalty.*

Mr. Butler's comment was made to the jury to develop an identification with them, to "get on common ground" with the jury and for sound tactical purposes. This strategy is especially significant where all jurors must be "Deaf [sic] Qualified" and therefore willing to consider applying the death penalty.

13. (6) *Defense counsel failed to raise, in the appeal of this case, the failure of the trial court to specifically answer a juror's question on prison life.*

During deliberations, the jury asked the following:

In order to award the proper punishment we need a clear prospective [sic] of what life in prison without parole really means. We know what the death penalty means, but we have no clue as to the reality of life without parole.

The questions we have are as follows:

1) Will Mr. Rhines *ever* be placed in a minimum security prison or be give [sic] work release.

2) Will Mr. Rhines be allowed to mix with the general inmate population.

3) Allowed to create a group of followers or admirers.

4) Will Mr [sic] Rhines be allowed to discuss, discribe [sic] or brag about his crime to other inmates, especially new or young men jailed for lesser crimes. (ex: drugs, DWI, assalt [sic] etc.)

5) Will Mr [sic] Rhines be allowed to marry or have conjugal visits.

6) Will he be allowed to attend college.

7) Will Mr [sic] Rhines have or attain any of the common joys of life (ex. TV, radio, music, telephone, or hobbies and other activities allowing him distraction from his punishment).

8) Will Mr [sic] Rhines be jailed alone or will he have a cellmate.

> 9) What sort of free time will Mr [sic] Rhines have. (What would his daily routine be.)
>
> We are sorry, your Honor, if any of these questions are inappropriate but there seems to be a huge gulf between our two alternitives [sic]. On one hand there is death, and on the other hand what is life in prison without parole.

Taken from trial transcript 2697-2701.

> The Court properly responded to the jury:
>
> Dear Jurors,
>
> I acknowledge your note asking questions about life imprisonment. All the information I can give you is set forth in the jury instructions.

Trial transcript at 2698.

Trial counsel did not request a detailed answer to this question. Trial transcript, 2697-2698. Rather, they asked that the Court use the explanation that it was using, but as a proviso that the jury could not engage in speculation or conjecture on the issue. The trial court determined that the speculation and conjecture language was not needed; the matter was raised on appeal in the context that the fact that the jury asked the questions showed that they were basing their verdict on Rhines' homosexuality. *Rhines*, 1996 S.D. 55, ¶¶ 101-107. The instructions as a whole set out the law the jury was to use in reaching its decision. The instructions were not in any sense deficient in setting out the law. No additional, detailed information about prison conditions was required to determine the issues in this case, and Defendant's future dangerousness was not explicitly at issue. Further, prison conditions are not an issue or consideration for the jury to concern itself

with, and elaborating on them would open up the possibility of error. There was no evidence available during the trial upon which the trial judge could have based an explanation of prison conditions, and further explanations would have been largely speculative.

In addition, the jury was told that a life sentence for Mr. Rhines would be life without the possibility of parole, and they were told so repeatedly.

Further, the area was addressed in the South Dakota Supreme Court Rhines *decision* as indicated above. There is no factual basis for relief based upon this issue.

> 14. (7) *The South Dakota Supreme Court was not presented with the case of Simmons v. South Carolina, 512 U.S. 154 (1994), which Rhines' search would have justified a reversal in the case.*

The United States Supreme Court in *Simmons v. South Carolina,* reversed a death sentence on the basis that the jury was not told that a "life sentence" would be without parole, where the Defendant's "future dangerousness" was a reason or basis for imposing the death penalty. Petitioner's counsel stated, at the habeas hearing herein, that he, Mr. Stonefield, was aware of *Simmons,* and what it had held, but he did not find it relevant to this case.

Factually, Mr. Stonefield's assessment appears to be correct. That Defendant may be dangerous in the future is not an aggravating factor or a criterion within South Dakota statutory scheme for imposing the death penalty. Even though there could be misunderstanding about the full significance of parole eligibility, the premise of *Simmons* is

inapplicable where future dangerousness is not a criterion for imposing the death penalty.

In addition, *Simmons* was after briefs were submitted, and before oral argument. The case was equally available to the South Dakota Supreme Court as it was to counsel.

Finally, life without parole was referred to a number of times in jury instructions and it was, therefore, defined.

15. (8) *The attorneys failed to effectively argue that death was a sentence which was disproportionate to the facts in this case compared to other similar situations.*

There is no showing that this issue was inadequately argued from a factual basis. In closing arguments, all three defense counsel argued before the jury that a sentence of death was disproportionate to the crime for which Defendant was found guilty. Petitioner's counsel submitted proportionality briefs on appeal and the South Dakota Supreme Court extensively considered the matter in direct appeal. This issue is therefore, res judicata and cannot be further considered on habeas. 1996 S.D. 55, ¶¶ 179-209.

16. (9) *The firm, to which Wayne Gilbert belonged at the time of the trial, hired a secretary who was the wife of the lead investigator of the case for the State.*

Mrs. Bahr is the wife of Pennington County Deputy Sheriff Don Bahr who was a lead investigator in Petitioner's case. Mrs. Bahr was hired by Gilbert's law firm shortly after the Petitioner's trial began. Gilbert was not immediately aware she had been hired and was not involved in the decision to hire her. Mrs. Bahr was hired as receptionist and had no access to any confidential

information concerning Petitioner's case. Gilbert was rarely in the office from the time she was hired until the completion of the trial. Petitioner presented no evidence to suggest any impropriety concerning her conduct.

17. (10) *There was a lack of communication and input available for him.*

This Finding is duplicative of (1) of the Court's Memorandum Opinion located above at Finding No. 8. As a result, Finding No. 8 is incorporated herein by reference.

In addition, Petitioner had numerous opportunities for input and complete discussion with counsel. Counsel met with Petitioner and discussed strategy and Petitioner was involved in the decision making process on various issues. When issues arose, a group discussion among Petitioner and his three counsel would occur and there was typically group consensus on how to proceed. Petitioner was involved in most all discussions involving his defense and Attorney Stonefield could think of no issue that was discussed without Petitioner's involvement and input. Petitioner has not identified any specific issues where counsel failed to communicate with him so that his defense was prejudiced.

Attorney Gilbert met most frequently with Petitioner. Gilbert did not believe communication was a problem between Butler, Stonefield, himself and Petitioner as they prepared for trial.

Petitioner presented no evidence of any communication problems during the course of the trial and prior to it.

Petitioner never offered an objection or discomfort with the quality of contact with counsel prior to or during trial.

18. (11) and (12) *The attorneys were unprepared for voir dire and trial and thus were ineffective.*

Two thousand sixty-seven (2,067) out of the two thousand seven hundred six (2,706) pages of trial transcript constitute *voir dire*. Counsel engaged in extensive questioning of jurors on an individual basis. The trial transcript sustains the expertise, effort and diligence of counsel. There is neither any evidence submitted, nor any suggestion in the record, to support the assertion that counsel were unprepared for *voir dire* or trial.

19. (13) *A Motion for Change of Venue should have been made.*

Counsel did consider the possibility of a Motion for Change of Venue, but they believed it was tactically not in the Defendant's best interest to do so. In addition, the course of *voir dire*, as it occurred, displayed clear evidence that the jury panel had not been tainted by pretrial, publicity. Indeed, this issue was reviewed by the Supreme Court. Therein, they stated, "Our review of *voir dire* shows an impartial jury was impaneled." *Rhines,* 1996 S.D. 55, ¶ 107, 548 N.W.2d at 442. It was counsel's opinion that pretrial publicity can best be examined through the individual *voir dire* they obtained. After reviewing a pretrial survey done in the community, they felt that a change of venue in this case would not benefit their client. Counsel was faced with the strong presumption under the law that a defendant can receive a fair trial in the community where the crime was committed. *State v Weatherford,* 416 N.W.2d 47, 50 (S.D. 1987). Beyond that, they reserved the option to raise this issue should the *voir dire* reveal a basis for such a request. The record of *voir dire* does not reveal any basis for this motion to be made. This was a sound tactical decision.

20. (14) and (15) *Defense should not have brought up the issue of Defendant's homosexuality during vior* [sic] *dire and they should have made a motion in limine to prevent reference to it.*

Counsel testified that the issue of homosexuality would inevitability come up through witnesses, and they believed that it could not be precluded. It was, therefore, their strategy to raise the matter on *voir dire*, to "deal with it head-on" and to sensitize the jury and gain an understanding of each juror's feelings on this issue. All three counsel believed this to be the best approach. It is not the province of the habeas court to second-guess the strategy of experienced trial counsel.

The fact of Rhines' homosexuality did, in fact, come up at trial. Viewed in light of the information available at the time, the determination was reasonable and not improper. All three trial counsel carefully considered this matter and determined that the approach taken was the best approach. Trial counsel so testified at the habeas hearing. This tactical decision was well within the province of counsel's judgment.

There could have been actual harm to Petitioner's case if the *voir dire* questions had not been asked, and if homosexuality came up, as counsel believed it inevitably would. This strategy decision was not unreasonable and not incompetent.

21. (16) *Objection should have been made to questioning of the medical examiner by the prosecutor suggesting the victim's hands were tied before he died.*

Defense counsel timely and successfully objected to testimony regarding chronological time frames for when the victim's hands were tied in the course of the attack. Defense counsel's objection was sustained because Dr. Habbe was unable to render an opinion based on a reasonable degree of medical certainty standard, and the jury was instructed to disregard any answers based on inference.

In addition, there was evidence from which a jury could draw conclusions concerning the sequence in which the rope was tied in relation to the death of the victim. *State v. Rhines*, 1996 S.D. 55, ¶ 163, 548 N.W.2d at 452.

Appropriate steps were taken by defense counsel to preclude any improper response by the medical examiner, and there is no reason to believe that the outcome of the case was in any way improperly influenced by the successfully challenged question posed by the prosecutor.

22. (17) and (18) *Counsel was ineffective by not objecting to the introduction of the Victim Impact Statement which was read by the mother of the victim.*

The mother of the victim read a Victim Impact Statement in Court, during the penalty phase of the trial. Counsel, for some time, was fully aware that the Impact Statement was going to be addressed and that there was a written statement which the mother may be anticipating reading. While the Court ruled on its admissibility immediately before its presentation, there was nothing more

counsel for the Defendant could do other than they had done. Nor was there any apparent basis to believe that what they could have forestalled its introduction. The request for a continuance would not have produced any further benefit for the Defendant.

23. (19) *Counsel should have made a motion to provide him with the opportunity to make an unsworn allocution to the jury at the penalty phase of trial.*

Even if Petitioner was legally entitled to a right of allocution, it was sound trial strategy for counsel not to seek such an opportunity for Petitioner. There was concern that a claim of remorse by Petitioner may open the door to evidence of Petitioner's criminal past being presented to the jury, which to that point had been successfully excluded from trial. Counsel did not believe Petitioner would appear remorseful before the jury and, therefore, any request for leniency from Petitioner may be more harmful than helpful. In addition, Petitioner did not want to make a statement before the jury. There were sound strategic reasons for Petitioner to forego an opportunity to speak to the jury. There are sound strategic reasons for an accused to forego an opportunity to speak to the jury.

Counsel's tactical decision to forego an opportunity for right of allocution was sound and nothing in this record justifies an attempt to second-guess counsel's and Petitioner's decision.

24. (20) *Defense counsel did not raise the argument, for the purpose of suppressing the Statement of the Defendant, that the police officer advised him prior to his statement no execution had occurred in South Dakota since 1947, as a means to entice a statement from him.*

The defense team discussed strategy for suppressing Rhines' confession and concluded that the strongest, and therefore best, argument for suppression was the inadequate *Miranda* warning. Counsel acknowledged that they thought about the statement by law enforcement but did not believe that it was the most viable argument for suppressing Rhines' confession. A strategic decision was made to argue for suppression based solely upon the inadequate *Miranda* warning.

In *State v. Rhines*, 1996 S.D. 55, ¶ 37, 548 N.W.2d 429 the South Dakota Supreme Court found that "Rhines' graphic statements reflect an individual who is aware of the potentially grave legal consequences of his confession." Rhines made a knowing and voluntary decision to relinquish his *Miranda* rights and, therefore, Petitioner's confession was properly admitted at trial.

Law enforcement's truthful comments about the implementation of the death penalty in South Dakota did not cause Petitioner's will to be overcome, thereby causing Petitioner to confess. Petitioner made some incriminating admissions prior to any comments from law enforcement about the history of executions in South Dakota. The statement by law enforcement, while undoubtedly intended to encourage the Defendant to cooperate with law enforcement, was accurate and not of such a nature to

overbear the will of the Defendant. *See State v. Smith*, 1998 S.D. 6, ¶ 8, 573 N.W.2d 515, 517.

25. (21) *An effort should have been made to solicit a plea agreement eliminating the death penalty should he implicate Sam Harter in this matter.*

In addition, Sam Harter was never even charged as a result of his role, if any, in this case. The state's attorney was clearly unwilling to compromise in his pursuit of the death penalty. There was no reason to believe that he would relent under any circumstances. Counsel, through deliberations and repeated discussions with the Petitioner and the state's attorney, were very convinced that there would be no plea agreement available in this case. Counsel could not have done anything more that would have made any difference in this case.

26. (22) and (23) *Not submitting jury instructions directing the jury to not consider the number of possible aggravating circumstances.*

Counsel did not submit jury instructions that would have stated that the number of aggravating circumstances could not be considered in determining whether to impose the death penalty. Petitioner argues that the State emphasized the number of aggravating circumstances, so he should have proposed such instructions. Petitioner's trial counsel Stonefield felt that the instructions should have been proposed. This Court finds, however, that the jury could consider all of the evidence and all of the circumstances that it had before it. There is nothing in the record to suggest that the process was tainted by a suggestion that the jury found more than one circumstance. There

were no significant arguments raised in closing by the State suggesting a stacking of circumstances in order to arrive at the death penalty. There was no error in failing to propose these instructions.

South Dakota law provides that for a jury to consider the death penalty; they must find at least one of a number of specific aggravating circumstances. Only after finding such a circumstance may they consider and possibly impose the death penalty. There is no weighing of particular circumstances under South Dakota law, the law requiring only that when a statutory aggravating circumstance is found, the jury may consider the death penalty.

The South Dakota Supreme Court already found that the instructions adequately set forth the nature and manner for the jury to consider, and this issue should, therefore, be factually subject to the doctrine of res judicata. The Supreme Court considered and found that the number of aggravating circumstances did make a difference in terms of the proportionality of the sentence. 1996 S.D. 55 at ¶ 207.

In the end, there simply is no evidence that the jury was somehow improperly influenced by the number of aggravating circumstances. The State did not suggest the same, the Petitioner did not suggest the same, and the matter quite simply never came up.

27. (24) *Failure to investigate Petitioner's background to provide effective mitigation.*

This Finding is duplicative of (4) of the Court's memorandum decision, located at Finding No. 11 above. As a result, Finding No. 11 is incorporated herein by reference.

In addition, one of the first efforts undertaken by counsel was to have Petitioner sketch out a biography of himself so that counsel could track mitigation leads. They searched for people from Petitioner's past, such as teachers or friends. They asked Petitioner directly for the names of teachers or friends whom they could interview.

Counsel also approached Petitioner's sisters and his brother. They attempted to recruit Petitioner's mother via the sisters. They called the sisters. Mother, however, was physically and emotionally incapable of testifying. Brother was simply unwilling.

Mike Stonefield went so far as to fly to Seattle, Washington, to locate a friend of Petitioner's. That effort to uncover mitigation evidence was unsuccessful as well.

Finally, counsel reviewed Petitioner's army records. As before, this search revealed nothing beneficial.

Mike Stonefield felt counsel could have attempted to paint a more complete picture of Petitioner's life at mitigation. However, that would only return them to the "big problem" in Stonefield's mind – that of opening up the opportunity for the State to present his criminal history.

There is no evidence to support the belief that there were any further mitigation witnesses available anywhere who would have been able to provide favorable mitigation evidence. There is no evidence to support the belief that, even if favorable mitigation evidence was available from some unknown witness, that such evidence would not have opened up the opportunity for the State to present evidence of Petitioner's prior criminal record. Counsel expended substantial and reasonable effort to investigate

mitigation evidence, and there is no evidence to support a belief that any further efforts would have been fruitful.

28. (25) *Heather Shepherd was not adequately cross-examined on inconsistencies in her testimony.*

This Finding is duplicative of (3) of the Court's memorandum decision located above at Finding No. 10. As a result, Finding No. 10 is incorporated herein by reference.

In addition, given the primary purpose of seeking to establish Petitioner's emotional state of mind to suggest a lesser offense than first degree murder, counsel's cross-examination was appropriate and reasonable. Any inconsistencies that existed did not relate to any issue of significance to the defense, as they would only address in a very limited way the commission of the crime. That was neither a matter of significant dispute, nor a material element of the defense. Any further cross-examination of Heather Shepherd's inconsistencies would have added nothing to the defense, and possibly detracted from it. Choosing to cross-examine Heather Shepherd in the manner that was employed was a tactical decision. Counsel could not have done anything more with cross-examination of Heather Shepherd that would have made any difference in this case. *See Sprik v. Class, supra.*

29. (26) *The assertion that counsel should have introduced evidence to prove that the victim was unfaithful to his fiancée to diminish the Victim Impact Statement presented in court.*

This would only serve to inflame the jury and serve no functional purpose. There is no evidence to support any indication that such evidence would, in any way, be helpful to Petitioner. Choosing to forego presenting this

evidence was a sound tactical decision founded upon no potential benefit, and possible harm. Presenting this evidence would not have made any difference in this case, other than perhaps expediting the same result.

30. (B) *Failure to suppress Mr. Rhines' statement.*

Miranda rights were provided appropriately to the Defendant. *State v. Rhines,* 1996 S.D. 55, ¶ 37, 548 N.W.2d at 429. This matter is res judicata.

31. (C) *Failure to keep Diane Staeffler on the jury.*

Ms. Staeffler could not set aside her attitudes toward the death penalty. Thus she was properly and reasonably excused. This matter is res judicata. *State v. Rhines,* 1996 S.D. 55 ¶ 51, 548 N.W.2d at 430-33.

32. (D) *State's selective use of peremptories.*

Peremptory challenges to potential jurors are discretionary for the State. The State did not use peremptory challenges in an inappropriate manner. This issue is res judicata. *State v. Rhines,* 1996 S.D. 55, ¶ 55, 548 N.W.2d at 433-35.

33. (E) *Failure to respond to jury questions on "the reality of life without parole."*

Life without parole was mentioned a number of times in closing argument and jury instructions. Its meaning was reasonably clear under the circumstances of this case in the instructions. This issue is res judicata. *State v. Rhines,* 1996 S.D. 55, ¶ 108, 548 N.W.2d at 442.

34. (F) *Capital punishment violates due process and equal protection.*

South Dakota capital punishment statutes have been upheld by the South Dakota Supreme Court. *State v. Moeller,* 1996 S.D. 60, ¶ 102, 548 N.W.2d at 487-89. This issue is res judicata.

35. (G) *Allowing a Victim Impact Statement denied due process.*

Impact statements have been provided for by law sometime prior to the murder in this case. SDCL 24-5A-43. *State v. Rhines,* 1996 S.D. 55, ¶ 132, 548 N.W.2d at 446-47. This issue is res judicata.

36. (H) *Insufficient evidence of torture.*

A jury finding of torture is supported by the evidence of the second non-fatal stab wound and the condition of the victim prior to the final blow. This issue is res judicata. *State v. Rhines,* 1996 S.D. 55, ¶ 164, 548 N.W.2d at 452.

37. (I) *The trial court erred in instructing on depravity of mind.*

Failure to appropriately instruct on depravity of mind did not undermine the other findings of the jury regarding the basis for the death penalty. This issue is res judicata. *State v. Rhines,* 1996 S.D. 55, ¶169, 548 N.W.2d at 453.

38. (J) *Error in aggravating circumstances which deny due process.*

This issue was discussed and rejected by the South Dakota Supreme Court and direct appeal throughout *State v. Rhines,* 1996 S.D. 55, ¶ 169, 548 N.W.2d at 415.

This issue is res judicata.

39. (K) *The jury's consideration of one or more invalid circumstances violated due process and equal protection.*

A jury can consider as many aggravating circumstances as it wants. It is required to find at least one statutory circumstance to exist in order to implement the death sentence. There is no violation of Petitioner's due process and equal protection rights. This issue is res judicata. *State v. Rhines,* 1996 S.D. 55, ¶¶ 165-169, 548 N.W.2d at 450.

40. (L) *Allowing statements by Rhines concerning the judicial system.*

The admission of statements made by Petitioner during the course of his admissions that were critical of the judicial process did not violate Petitioner's rights. The trial court weighed the prejudice versus probative value of the statements and exercised its sound discretion in allowing the statements into evidence. This issue is res judicata. *State v. Rhines,* 1996 S.D. 55, ¶¶ 92-94, 548 N.W.2d at 440-442.

41. (M) *Denied appointment of forensic communication experts.*

The appointment of experts is in the sound discretion of the trial court. The Court did not abuse its discretion in this matter. This matter is res judicata. *State v. Rhines,* 1996 S.D. 55, ¶¶ 106-108, 548 N.W.2d at 442.

42. (N) *Refusal of Defendant's proposed instructions.*

The trial court has broad discretion in instructing the jury and the instructions should be considered as a whole. Instructions 8, 9, and 11 were not necessary. This issue is

res judicata. *Rhines,* 1996 S.D. 55, ¶ 111, 548 N.W.2d at 443, 444.

43. (O) *Jury was influenced by passion and prejudice and other factors.*

The evidence presented at trial is more than adequate to support the jury's verdict. This issue is res judicata. *State v. Rhines,* 1996 S.D. 55, ¶¶ 180-185, 548 N.W.2d at 455.

44. (P) *Disproportionate sentence in this case compared to other homicides.*

The South Dakota Supreme Court went through a detailed comparison of other homicides and found this sentence to be entirely justified and proportionate. This issue is res judicata. *State v. Rhines,* 1996 S.D. 55, ¶¶ 185-209, 548 N.W.2d at 455-58.

45. (Q) *The use of State v. Moeller, 1996 S.D. 60, 548 N.W.2d 465 was not appropriate in the proportionately review.*

Petitioner's sentence was imposed by the jury. The fact that the South Dakota Supreme Court later reversed Moeller's sentence does not affect the efficacy of Petitioner's sentence itself. The jury decision on the death penalty was not seen to be defective. Thus, it was reasonable for the South Dakota Supreme Court to consider it.

46. (R) *Prejudicial misconduct of the State seeking a statement from the medical examiner that the victim's hands were tied before his death.*

This issue is res judicata; in addition, the contents of Findings No. 21 above are hereby incorporated by reference.

State v. Rhines [sic], 1996 S.D. 55, ¶ 163, 548 N.W.2d at 452.

47. (S) *Prosecutorial misconduct by not stating until the day of the penalty phase they would use the Victim Impact Statement.*

Defense counsel was aware for some time that the State may herein use this evidence. There was no prejudice therefrom. This issue is res judicata; in addition, the contents of Findings No. 22 above are hereby incorporated by reference herein.

48. (T) *Prosecutor referring to gutting the victim.*

This was not an unreasonable reference to the nature of the initial wound received by the victim. While the word may be graphic it is nonetheless reasonably relevant to the wound and therefore appropriate.

49. (U) *Enlarged photographs offered by the prosecution were inappropriate in showing the injuries sustained by the victim.*

The introduction of photographs is within the reasonable discretion of the trial court and it is not on its face misconduct by the prosecution. This contention is without merit based on all the evidence, and is unsupported by any evidence.

50. *Incompetence of counsel by not obtaining and submitting a letter to the State for the purposes of offering a plea agreement in which the Defendant would accept a life sentence.*

It is generally not appropriate to introduce plea negotiations to the jury in any phase of the jury process.

Had such a letter been prepared it is doubtful it would have been allowed to be introduced before the jury. It is further, very dubious that it would have any positive benefit for the Defendant. It is not a significant issue which could have changed the course of the jury's decision.

In addition, the contents of Findings No. 25 are incorporated herein.

51. Issues – B, C, D, E, F, G, H, I, J, K, L, M, N, O, and P were deiced [sic] by the South Dakota Supreme Court on direct appeal and are res judicata.

Based on the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. The above-entitled matter is properly venued before this Court.

2. This Court has personal jurisdiction over the parties.

3. This Court has subject matter jurisdiction over the above-entitled matter.

4. This Court based upon the foregoing, does have jurisdiction to issue a final and binding decision regarding Petitioner's Amended Application for Writ of Habeas Corpus.

5. Habeas corpus is a collateral attack on a final judgment and, therefore, this Court's scope of review is limited to questions of jurisdiction and basic constitutional rights. *Goodroad v. Solem*, 406 N.W.2d 141, 142-143 (S.D. 1994); *Jenner v. Leapley*, 521 N.W.2d 422, 425 (S.D. 1987).

6. Habeas corpus may only be used to review (1) whether the Court has jurisdiction of the crime and the person of the Defendant; (2) whether the sentence was authorized by law; and (3) in certain cases, whether an incarcerated Defendant has been deprived of basic constitutional rights. *St. Cloud v. Leapley,* 521 N.W.2d 118, 129 (S.D. 1994). *Id.* (*Aliberti v. Solem*, 428 N.W.2d 638, 640 (S.D. 1988); *Satter v. Solem,* 422 N.W.2d 425, 427 (S.D. 1988); *Goodroad v. Solem*, 406 N.W.2d 141, 144 (S.D. 1987); *State ex rel. Burns v. Erickson*, 80 S.D. 639, 129 N.W.2d 712, 715 (1964).

7. The scope of this Court's review is also limited by the doctrine of res judicata, as this doctrine applies to habeas corpus proceedings. *St. Cloud v. Leapley*, 521 N.W.2d at 118; *Miller v. Leapley,* 472 N.W.2d 517, 519 (S.D. 1991); *Cowell v. Leapley,* 458 N.W.2d 514, 520 (S.D. 1990).

8. Habeas corpus is not a substitute for direct appeal *Goodroad v. Solem*, 406 N.W.2d 141 (S.D. 1987).

9. Res judicata bars the re-examination of those issues substantially raised in Petitioner's direct appeal. *St. Cloud, supra*; *Miller, supra*; *Cowell, supra.* It also bars the examination of issues raised upon direct appeal which are substantially raised in the habeas proceeding as an ineffective assistance of counsel claim. *Stumes v. Delo,* 508 N.W.2d 366, 370 (S.D. 1993).

10. South Dakota has adopted and applies the test for ineffective assistance of counsel claims set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

11. In a habeas corpus action where the claim is ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient. This requires showing that the counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the Defendant by the Sixth Amendment. Second, the Petitioner must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose results were reliable. *Olsen v. Lee,* 524 N.W.2d 616 (S.D. 1994); citing from *Iron Shell v. Leapley,* 503 N.W.2d 868, 870 (S.D. 1993); (quoting *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984)). *See also Kimmelman v. Morrison,* 477 U.S. 365, 375 (1986) and *Luna v. Solem,* 411 N.W.2d 656, 658 (S.D. 1987).

12. It is not enough for the Petitioner to show that the verdict would have been different, he must show "that the counsel's errors were so serious as to deprive the Defendant of a fair trial, a trial whose result is reliable." *Lukken v. Class,* 561 N.W.2d 302, 308 (S.D. 1997).

13. There exists a strong presumption that counsel is competent, which presumption the Petitioner must overcome. *Michel v. State of Louisana* [sic], 350 U.S. 91, 101 (1955); *Luke v. Class*, 1996 S.D. 107, ¶ 14, 554 N.W.2d 189, 191, 192; Art. 92.

14. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances and the standard of review is highly deferential." *Phyle v. Leapley,* 491 N.W.2d 429, 433 (S.D. 1992).

15. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process so the trial cannot be relied on as having produced a just result." *Strickland v. Washington,* 466 U.S. at 686.

16. Trial tactics cannot be used as a basis for claimed error. *Boykin v. Leapley,* 471 N.W.2d 165 (S.D. 1991); *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 80 L.Ed.2d 674 (1984).

17. Petitioner must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy. *Phyle v. Leapley,* 491 N.W.2d 429, 433 (S.D. 1992).

18. The Petitioner must overcome the presumption of adequacy of counsel. *Kimmelman v. Morrison,* 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

19. Trial tactics cannot be used as a basis for claimed error. *Boykin v. Leapley,* 471 N.W.2d 165, 169 (S.D. 1991); *Strickland,* 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694 (1984).

20. (1) *He never met with two of his three counsel prior to the start of the trial. Therefore, he asserts, there was a lack of pretrial preparation.*

This Conclusion is duplicative of (10) of the Court's memorandum decision, located below at Conclusion No. 28. As a result, Conclusion No. 28 is incorporated herein by reference.

In addition, counsel's decision to develop a division of labor and pursue respective responsibilities was a decision

grounded in trial strategy. Further individual contact with counsel would not have made any difference in this case. The division of labor, and counsel's individual contact with Petitioner, did not fall below an objective reasonableness standard. There is no reasonable probability that the result of the trial proceeding would have been any different had Petitioner had further contact with individual counsel.

21. (2) *One of his counsel was depressed and engaged in theft during the course of time that he was representing Rhines.*

Counsel was not ineffective with regard to this issue because there is not evidence to support his belief that this counsel failed, in any way to fully inadequately represent Mr. Rhines or to indicate that this situation in any way detracted form [sic] the legal services provided by this attorney. The problems of this attorney in no way manifested themselves in the trial of this case. Rhines has not alleged, or shown, deficient prejudice to his case.

The following statement: Counsel was not ineffective with regard to this issue because Rhines has not alleged, or shown, deficient performance or prejudice to his case.

22. (3) *There was a failure to cross-examine some of the prosecution witnesses.*

This Conclusion is duplicative of (25) of the Court's memorandum decision, located below in Conclusion No. 39. As a result, Conclusion No. 39 is incorporated herein by reference.

In addition, counsel's decisions not to cross-examine certain witnesses called by the State were decisions grounded in trial strategy. Counsel could not have done

anything more with these witnesses that would have made any difference in this case. These decisions did not fall below an objective reasonableness standard. There is no reasonable probability that the result of the trial proceeding would have been any different had counsel cross-examined these witnesses.

23. (4) *Failure of the lawyers to call witnesses who lived in Rapid City to provide mitigation evidence.*

This Conclusion is duplicative of (24) of the Court's memorandum decision, located below at Conclusion No. 38. As a result, Conclusion No. 38 is incorporated herein by reference.

In addition, the decision to call witnesses is a strategic decision. Failure to call a witness will not automatically produce ineffective assistance of counsel. Counsel's decision not to call Rapid City mitigation witnesses was a decision grounded in trial strategy. Thus, Petitioner must overcome a strong presumption that counsel's actions constituted reasonable trial strategy. *Snell v. Lockhart,* 14 F.3d 1289, 1301 (8th Cir. 1994). He has not.

Presentation of mitigation witnesses from Rapid City would not have made any difference in this case. Mitigation efforts and decisions did not fall below an objective reasonableness standard. There is no reasonable probability that the result of the trial proceeding would have been any different had counsel presented mitigation witnesses from Rapid City.

24. (5) *His counsel, Joseph Butler, advised the jury that he supported the death penalty.*

Counsel was not ineffective with regard to this issue because plausible trial strategy does not rise to ineffective assistance of counsel. *Loop v. Class*, 1996 S.D. 107, ¶ 18, 554 N.W.2d at 192.

25. (6) *Defense counsel failed to raise, in the appeal of this case, the failure of the trial court to specifically answer a juror's question on prison life.*

Counsel was not ineffective with regard to this issue because the instructions as a whole set out the law the jury was to use in reaching their decision. In prison conditions are not an issue for the jury to concern themselves with and to attempt to elaborate on them would open the possibility of error.

26. (7) *The South Dakota Supreme Court was not presented with the case of Simmons v. South Carolina, 512 U.S. 154, (1994), which Rhines asserts would have justified a reversal of this case.*

Defense counsel was not ineffective with regard to this issue because life without parole was referred to in the jury instructions a number of times and there was no issue raised as to Petitioner's future dangerousness under South Dakota law. Therefore, counsel was not deficient for failing to present the case of *Simmons v. South Carolina*. Nor has Defendant shown any prejudice by this case not being presented to the South Dakota Supreme Court.

27. (8) *The firm, to which Wayne Gilbert belonged at the time of trial, hired a secretary who was the wife of the lead investigator of the case for the State.*

Counsel was not ineffective with regard to this issue because Mrs. Bahr was hired without Mr. Gilbert's awareness. She had no access to any confidential information concerning the case, and served as a receptionist without access to any confidential information. There was no evidence submitted to suggest any improprieties concerning her conduct. Rhines has not alleged, or shown, deficient performance or prejudice to his case.

28. (10) *There was a lack of communication and input available for him.*

Counsel was not ineffective with regard to this issue because there were numerous opportunities for input and complaint discussion available with counsel. There is no evidence with any communication problems whatsoever during the course of the trial or prior to it. Rhines has not alleged, or shown, deficient performance or prejudice to his case.

29. (11) and (12) *The attorneys were unprepared for voir dire and trial and thus were ineffective.*

The record does not support these allegations, thus there can be no showing of prejudice. Counsel was not deficient. Mere conclusory statements are insufficient to sustain an ineffective assistance of counsel claim. Petitioner has failed to overcome the strong presumption that counsel rendered adequate assistance. There is no reasonable probability that the result of *voir dire* or trial would

have been any different had counsel prepared themselves differently.

30. (13) *A Motion for Change of Venue should have been made.*

Counsel was not ineffective with regard to this issue because plausible trial strategy does not rise to ineffective assistance of counsel. *Sprik v. Class,* 1997 S.D. 134, ¶¶ 24-25, 572 N.W.2d 824, 829-830.

31. (14) and (15) *Defense counsel should not have brought up the issue of Defendant's homosexuality during voir dire and that they should have made a motion in limine to prevent reference to it.*

Counsel was not ineffective with regard to this issue because the issue of Defendant's homosexuality would inevitability come up through witnesses and the best approach was to deal with it head on, in order to sensitize the jury and get a better understanding as to the jurors feelings. This decision was a tactical decision well within the parameters of counsel's judgment. Rhines has not alleged, or shown, deficient performance or prejudice to his case.

32. (16) *Objection should have been made to questioning of medical examiner by prosecutor suggesting that victim's hands.*

Counsel was not ineffective with regard to this issue because there was evidence from which a jury could draw conclusions concerning the sequence in which the rope was tied in relationship to the death of the victim and an appropriate objection was made by defense counsel thereby precluding any improper response by the medical

examiner. Rhines has not alleged or shown, deficient performance or prejudice to his case.

33. (17) and (18) *Counsel was ineffective by not objecting to the introduction of the Victim Impact Statement which was read by the mother of the victim.*

Counsel was not ineffective with regard to this issue because defense counsel was fully aware that the impact statement was going to be addressed and that there was a written statement which the mother may be anticipating reading. Counsel could have done nothing more than they did. There was not any basis to believe that they could have forestalled the introduction of this testimony. In addition the request for continuance would not have produced any further benefit for the Defendant. Petitioner has alleged, or shown, deficient performance or prejudice to his case.

Counsel was not ineffective with regard to this issue because Rhines has not alleged, or shown deficient performance or prejudice to his case. *State v. Rhines,* 1996 S. D. 55, ¶ 130.

34. (19) *Counsel should have made a motion to ride in with the opportunity to make a unsworn allocution to the jury at the penalty phase of trial.*

Counsel was not ineffective with regard to this issue because even though there may be some marginal support for legal argument that such an allocution could be made, counsel chose not to propose it for three very sound strategic reasons. First there was concern that the allocution may not ring with sufficient remorse and that it would not work to Defendant's benefit. There was a possibility that the Defendant in his allocution could open up the door to

allowing in evidence of his prior criminal history. Third, Petitioner did not choose to make a statement before the jury. Rhines has not alleged, or shown, deficient performance or prejudice to his case.

> 35. (20) *Defense counsel did not raise the argument for the purposes of suppressing the statements of the Defendant, that the police officer advised him prior to his statement, no executions had occurred in South Dakota since 1947, as a means to entice a statement from him.*

Counsel was not ineffective with regard to this issue because counsel believed there was a stronger argument for suppression in the alleged *Miranda* warning violation. In addition, there is nothing in the record that suggests that this statement in any fashion weighed on the decision by the Defendant to make his admissions and confession. Finally, the statement was accurate and not of such a nature to overbear the will of the Defendant. *See State v. Smith*, 1998 S.D. 6, ¶ 8, 573 N.W.2d 515, 517.

> 36. (21) *An effort should have been made to solicit a plea agreement eliminating the death penalty should he implicate Sam Harter in this matter.*

The two-part *Strickland v. Washington* test for evaluating claims of ineffective assistance of counsel also applies to guilty pleas. *Hill v. Lockhart*, 474 U.S. 52, 100 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). Failure to negotiate a plea, though, is not ineffective without a showing that the prosecution was willing to enter into plea negotiations. A futile effort at a plea agreement is not necessary. *See Thompson v. Wainwright*, 784 F.2d 1103, 1107 (11th Cir. 1986). Counsel's effort to secure a plea bargain agreement was not deficient. Given the state's Attorney's posture,

those efforts did not fall below an objective reasonableness standard. Without any showing that the state's attorney was willing to enter into plea negotiations with counsel, all that Petitioner urges is speculation. Such speculation fails to establish a reasonable probability that the outcome would have been different. Accordingly, Petitioner has not and cannot establish prejudice. *United States v. Boon*, 62 F.3d 323, 327 (10th Cir. 1995).

> 37. (22) and (23) *Not submitting the jury instructions directing the jury to not consider the number of possible aggravating circumstances.*

Counsel was not ineffective with regard to this issue because the instructions adequately set forth in nature manner which the jury is to reach a decision concerning the death penalty. Rhines has not alleged, or shown, deficient performance or prejudice to his case.

> 38. (24) *Failure to investigate Defendant's background to provide effective mitigation.*

This Conclusion is duplicative of (4) of the Court's memorandum decision located above at Conclusion No. 23. As a result, Conclusion No. 23 is incorporated herein by reference.

In addition, strategic choices made after a less than complete investigation are reasonable precisely to the extent that a reasonable professional judgment support the limitations on investigations. *Strickland v. Washington*, 466 U.S. at 690-691. Counsel's decision not to mount the all out mitigation investigation advanced by Petitioner was supported by reasonable professional judgment. *See Burger v. Kemp*, 483 U.S. 776, 794, 107 S.Ct. 3114, 3125-26, 97 L.Ed.2d 638 (1987). Petitioner has not demonstrated that the mitigation investigation of counsel fell

outside the wide range of professionally competent assistance. *See Strickland v. Washington*, 466 U.S. at 690, 104 S.Ct. at 2066. Counsel exercised the skill and diligence that reasonably competent counsel would exercise under similar circumstances. There is no reasonable probability that the result of this proceeding would have been any different had counsel mounted a more extensive mitigation investigation. *See Darden v. Wainwright*, 477 U.S. 168, 184-186, 106 S.Ct. 2464, 2473-74, 91 L.Ed.2d 144 (1986), *Strickland v. Washington*, 466 U.S. at 694, 404 S.Ct. at 2068. Counsel made a significant effort, based on reasonable investigation and logical argument, to mitigate Petitioner's punishment. *See Stewart v. Gramley*, 74 F.3d 132, 135 (7th Cir. 1996).

Petitioner, through Michael Butler, offers the "American Bar Association Guidelines For The Appointment And Performance Of Counsel In Death Penalty Cases" as a backdrop against which to measure counsel's representation in this matter. However,

> Prevailing norms of practice as reflected in American Bar Association standards . . . are guides to determine what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's

> cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to insure that criminal defendants receive a fair trial. [Citations omitted.]

Strickland v. Washington, 466 U.S. at 688-689.

Not withstanding [sic] the ABA guidelines offered by Petitioner, counsel's decisions regarding what manner in which to go about investigating mitigation evidence were decisions grounded in trial strategy based upon what was available to them. There is no evidence offered, nor any indication in the record, that any additional mitigation investigation would have made any difference in this case. Counsel's mitigation investigation did not fall below an objective reasonableness standard. There is no reasonable probability that the result in this case would have been any different had counsel pursued a more extensive mitigation investigation.

> 39. (25) *Heather Shepherd was not adequately cross-examined on inconsistencies in her testimony.*

This Conclusion is duplicative of (3) in the Court's memorandum decision, located above at Conclusion No. 22. As a result, Conclusion No. 22 is incorporated herein by reference.

In addition, counsel's decision to cross-examine Heather Shepherd in the manner which was employed was a decision grounded in trial strategy. Further cross-examination would not have made any difference in this case. Said cross-examination did not fall below an objective

reasonableness standard. There is no reasonable probability that the result of the trial proceeding would have been any different had counsel further cross-examined Heather Shepherd.

40. (26) *The assertion that counsel should have introduced evidence to prove that the victim was unfaithful to his fiancée to diminish the Victim Impact Statement presented in Court.*

Counsel's decision to forego this evidence was a decision grounded in trial strategy and common sense. Presenting such evidence would have not made any difference in this case, other than negative. Abstaining from such inflammatory evidence did not fall below an objective reasonableness standard. There is no reasonable probability that the result of the sentencing proceeding would have been any different had this evidence been presented.

41. *Trial counsel was incompetent by not obtaining and submitting a letter to the State for purposes of offering a plea agreement in which the Defendant would accept a life sentence.*

This Finding is duplicative of (21) of the Court's memorandum decision, located at Finding No. 36 above. As a result, Finding No. 36 is incorporated herein by reference.

In addition, it is very doubtful such a letter containing plea negotiations would have been allowed to be introduced before the jury. Indeed, Petitioner was unable to cite any rule of evidence supporting such a notion. To the contrary, there was a standing written order that counsel were *not* to refer to plea negotiations.

Moreover, it is very dubious that such a letter would have had any positive benefit for Petitioner. As the Supreme Court has previously noted, Petitioner's confessions presented "compelling evidence of the Defendant's moral copeability [sic] and apparent lack of sincere remorse." *Rhines,* 1996 S.D. 55, ¶ 209, 548 N.W.2d at 458.

It is, as a general rule, not appropriate to introduce plea negotiations to the jury at any phase of the jury process. Counsel's attempt to do so would have been futile, and would have made no difference in this case. Counsel's failure to do so did not fall below an objective reasonableness standard. Such a letter could not, under any stretch of the imagination, be considered a significant issue which could have changed the course of the jury's decision. There is no reasonable probability whatsoever that the result of the trial proceeding would have been any different had Petitioner offered such a letter as mitigation evidence.

42. (B) *Failure to suppress Mr. Rhines' statement.*

The trial court did not err in failing to suppress the Petitioner's statement. Consideration of this matter is barred by the doctrine of res judicata.

43. (C) *Failure to keep Diane Staeffler on the jury.*

The trial court did not err in excusing perspective juror Diane Staeffler for cause. In addition, consideration of this issue is precluded by the doctrine of res judicata.

44. (D) *State's selective use of peremptories.*

The trial court did not err in allowing the State to use peremptory challenges as it did. In addition, this point is barred by the doctrine of res judicata.

45. (E) *Failure to respond to jury questions on "the reality of life without parole."*

The trial court did not err in failing to respond to jury questions about the reality of life without parole. In addition, consideration of this issue is barred by res judicata.

46. (F) *Capital punishment violates due process and equal protection.*

South Dakota capital punishment statutes do not violate due process and equal protection. In addition, further consideration of this issue is barred by the doctrine of res judicata.

47. (G) *Allowing a Victim Impact Statement denied due process.*

Petitioner was not denied due process when the trial court allowed the reading of a victim impact statement by the victim's mother. In addition, further consideration of this issue is barred by the doctrine of res judicata.

48. (H) *Insufficient evidence of torture.*

There is not insufficient evidence of torture in order to uphold an aggravating circumstance during the penalty phase. In addition, further consideration of this issue is barred by the doctrine of res judicata.

49. (I) *The trial court erred in instructing on depravity of mind.*

While the South Dakota Supreme Court found that the trial court did fail to appropriately instruct on the issue of "depravity of mind," the Court also found that such failure did not undermine the other findings of the jury on the basis for the death penalty. This conclusion by

the South Dakota Supreme Court was correct, and, in addition, further consideration of this issue is barred by the doctrine of res judicata.

50. (J) *Error in aggravating circumstances which deny due process.*

There was no error in definition by the Court, or finding by the jury, regarding the aggravating circumstances found by the jury, except the trial court's failure to appropriately instruct on depravity of mind. Such failings as there were do not undermine the other findings of the jury, and there was no other error in aggravating circumstances which would otherwise deny due process. In addition, further consideration of this issue is barred by the doctrine of res judicata.

51. (K) *The jury's consideration of one or more invalid circumstances violated due process and equal protection.*

The jury's consideration of the invalid aggravating circumstance of "depravity of mind" did not violate either due process or equal protection; all other consideration of aggravating circumstances was proper and appropriate, as found by the South Dakota Supreme Court on direct appeal. In addition, further consideration of this issue is barred by the doctrine of res judicata.

52. (L) *Allowing statements by Rhines concerning the judicial system.*

The trial court properly admitted Petitioner's statements critical of the judicial system, as found by the South Dakota Supreme Court on direct appeal. In addition, further consideration of this matter is barred by the doctrine of res judicata.

53. (M) *Denied appointment of forensic communication experts.*

Denial of appointment of forensic communication expert, by the trial court, was not an abuse of discretion, did not violate due process, and was otherwise not erroneous. In addition, further consideration of this matter is barred by the doctrine of res judicata.

54. (N) *Refusal of Defendant's proposed instructions.*

Refusal of the Petitioner's proposed Instruction Nos. 8, 9, and 11 was not erroneous, and did not amount to a violation of due process or any other constitutional right. In addition, further consideration of this matter is barred by the doctrine of res judicata.

55. (O) *Jury was influenced by passion and prejudice and other factors.*

The jury was not unduly influenced in rendering its verdict, the verdict was not a product of passion and prejudice, and the evidence presented at trial is more than adequate to support the jury's verdict. In addition, further consideration of this matter is barred by the doctrine of res judicata.

56. (P) *Disproportionate sentence in this case compared to other homocides* [sic].

Petitioner's sentence was not disproportionate in this case, as compared to other homicides, and the South Dakota Supreme Court found that his sentence was entirely justified and proportionate. Further consideration of this matter is also barred by the doctrine of res judicata.

57. (Q) *The use of State v. Moeller was not appropriate in the proportionality review.*

There was no violation of due process, nor any other constitutional right, when the South Dakota Supreme Court considered the case of *State v. Moeller* in determining proportionality of this Defendant's sentence. Further, since the Court has considered such case, further consideration of this matter is barred by the doctrine of res judicata.

58. [R] *Prejudicial misconduct of the State seeking a statement from the medical examiner that the victim's hands were tied before his death.*

There was no prejudicial misconduct of the State of South Dakota in seeking a statement from the medical examiner that the victim's hands were tied before his death. In addition, further consideration of this matter is barred by the doctrine of res judicata.

59. (S) *Prosecutorial misconduct by not stating until the day of the penalty phase they would use the Victim Impact Statement.*

There was no prosecutorial misconduct in the State's introduction of a victim impact statement, since defense counsel were aware for some time that the State was about to use such evidence. In addition, further consideration of this matter is barred by the doctrine of res judicata.

60. (T) *Prosecutor referring to getting the victim.*

There was no prejudicial prosecution misconduct, nor any violation of any of Petitioner's constitutional rights, when the State referred to "gutting the victim."

61. (U) *Enlarged photographs offered by the prosecution were inappropriate in showing the injuries sustained by the victim.*

There was no violation of Defendant's rights under the United States or South Dakota Constitutions when the State offered enlarged photographs. The contention is unsupported by evidence or cogent and appropriate argument, and is, as a matter of law, without merit.

62. There was no incompetence of counsel, no deficient performance, and no prejudice to the Petitioner for counsel's failure to "obtain and submit a letter to the State for purposes of offering a plea agreement in which the defendant would accept a life sentence." Counsel repeatedly attempted to get such a plea bargain; the State refused; and the trial court, in all likelihood, would not have admitted such a letter at the time of the penalty phase herein.

63. ISSUES B, C, D, E, F, G, H, I, J, M, N, O, and P, are barred from consideration herein by the doctrine of *res judicata*.

64. If any Finding of Fact is improperly designated as such, it is hereby incorporated by reference in the Conclusions of Law. If any Conclusion of Law is improperly designated as such, [it] is hereby incorporated by reference as a Finding of Fact.

Dated this 16 day of November, 1998.

/s/ [Illegible] _____
The Honorable Merton B. Tice
Circuit Court Judge

ATTEST:

James Truman
/s/ C. Nelson, deputy
Clerk of Courts

(SEAL)
j-pld5.gg

608 N.W.2d 303

Supreme Court of South Dakota.

Charles Russell RHINES, Petitioner and Appellant,
v.
Douglas WEBER, Warden, South Dakota State Penitentiary, Appellee.

No. 20816.

Argued Sept. 16, 1999.
Decided Feb. 9, 2000.

Mark Barnett, Attorney General, Craig M. Eichstadt, Deputy Attorney General, Grant Gormley, Gary Campbell and Sherri Sundem Wald, Assistant Attorneys General, Pierre, for appellee.

JAMES W. ANDERSON, Circuit Judge.

Charles Russell Rhines (Rhines) appeals from a circuit court judgment denying his application for a writ of habeas corpus. We affirm.

FACTS AND PROCEDURE

A full review of the facts can be found in this Court's previous opinion affirming Rhines' conviction and sentence. *State v. Rhines,* 1996 SD 55, 548 N.W.2d 415, *cert. denied, Rhines v. South Dakota,* 519 U.S. 1013, 117 S.Ct. 522, 136 L.Ed.2d 410 (1996). Only those facts relevant to Rhines' present appeal of the denial of habeas corpus will be reiterated in this opinion.

From late 1991 until he was terminated in February 1992, Rhines worked at the Dig 'Em Donut Shop on West Main Street in Rapid City, South Dakota. On March 8,

1992, the body of Donnivan Schaeffer, an employee of Dig 'Em Donuts, was found in the back storeroom of the donut shop. Schaeffer's hands had been bound, and he had been stabbed in the abdomen, upper back, and the back of the neck. Approximately $3,300 in cash, coins, and checks was missing from the store.

On July 27, 1992, Rhines was indicted by a Pennington County grand jury in connection with the burglary at Dig Em' Donuts and the murder of Schaeffer. Trial commenced on January 4, 1993, with Rhines being represented by Wayne Gilbert, Joseph Butler, and Michael Stonefield. On January 22, 1993, the jury found Rhines guilty of premeditated first-degree murder and third-degree burglary.

On January 26, 1993, the same jury sentenced Rhines to death by lethal injection for the first-degree murder conviction, having found four aggravating circumstances in connection with Schaeffer's death: (1) the offense was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest under SDCL 23A-27A-1(9); (2) the offense was committed for the purpose of receiving money under SDCL 23A-27A-1(3); (3) the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture under SDCL 23A-27A-1(6); and (4) the offense was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of the mind under SDCL 23A-27A-1(6).

Thereafter, Rhines' trial counsel were appointed to represent him on appeal of his conviction and sentence to this Court. In that appeal, we ruled that the sentencing jury's discretion was not adequately channeled by the "depravity of the mind" aggravating circumstance, as

limited by the trial court's instruction. *Rhines,* 1996 SD 55, ¶ 148, 548 N.W.2d at 449. However, we held that "the invalidity of the 'depravity of the mind' circumstance d[id] not so taint the penalty proceedings as to mandate reversal of Rhines' death sentence." *Id.* at ¶ 169, 548 N.W.2d at 453. Accordingly, this Court affirmed Rhines' conviction and death sentence.

Subsequently, Rhines filed an application for writ of habeas corpus. The Honorable Merton Tice Jr. denied the application and quashed the writ in a written opinion dated October 8, 1998. Additional facts will be recited herein as they relate to specific issues.

STANDARD OF REVIEW

The remedy of a writ of habeas corpus "is in the nature of a collateral attack on a final judgment, therefore, our scope of review is limited." *Black v. Class,* 1997 SD 22, ¶ 4, 560 N.W.2d 544, 546.

> Habeas corpus can be used only to review (1) whether the court had jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases, whether an incarcerated defendant has been deprived of basic constitutional rights. For purposes of habeas corpus, constitutional violations in a criminal case deprive the trial court of jurisdiction.

Siers v. Class, 1998 SD 77, ¶ 9, 581 N.W.2d 491, 494 (quoting *Black,* 1997 SD 22, ¶ 4, 560 N.W.2d at 546). Moreover, "[h]abeas corpus is available only where the defendant is imprisoned or restrained of his liberty." *Loop*

v. Class, 1996 SD 107, ¶ 11, 554 N.W.2d 189, 191 (quoting *Two Eagle v. Leapley*, 522 N.W.2d 765, 768 (S.D.1994)).

We have also stated:

> Habeas corpus is not a substitute for direct review . . . The habeas petitioner has the initial burden to prove by a preponderance of the evidence that he is entitled to relief. The habeas court's factual findings are given 'considerable deference' and we will not reverse these findings unless they are clearly erroneous.

Siers, 1998 SD 77, ¶¶ 9-10, 581 N.W.2d at 494 (citations omitted).

In regard to ineffective assistance of counsel claims, the following standard applies:

> Whether a defendant has received ineffective assistance of counsel is essentially a mixed question of law and fact. In the absence of a clearly erroneous determination by the circuit court, we must defer to its findings on such primary facts regarding what defense counsel did or did not do in preparation for trial and in . . . presentation of the defense at trial. This court, however, may substitute its own judgment for that of the circuit court as to whether defense counsel's actions or inactions constituted ineffective assistance of counsel.

Loop, 1996 SD 107, ¶ 11, 554 N.W.2d at 191 (quoting *Aliberti v. Solem,* 428 N.W.2d 638, 640 (S.D.1988)).

ANALYSIS AND DECISION
ISSUE ONE

Whether the circuit court erred in denying Rhines' application for writ of habeas corpus based on claims of ineffective assistance of counsel.

The Sixth Amendment "right to counsel is the right to the *effective* assistance of counsel." *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674, 692 (1984) (emphasis added). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.,* 104 S.Ct. at 2064, 80 L.Ed.2d at 692-93.

This Court applies a two-prong test to ineffective assistance of counsel claims. In order to meet the burden of proof for a claim of ineffective assistance of counsel, a defendant must prove (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that such deficiency prejudiced the defendant. *Siers,* 1998 SD 77, ¶ 12, 581 N.W.2d at 495; *Sprik v. Class,* 1997 SD 134, ¶ 22, 572 N.W.2d 824, 829; *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

In regard to the first prong of this test, an objective standard of reasonableness, counsel's errors must be "so serious that [he or she] was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Garritsen v. Leapley,* 541 N.W.2d 89, 93 (S.D.1995) (quoting *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693))). As a result, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. A defendant asking this Court to invoke such scrutiny carries a heavy burden:

> Because of the difficulties inherent in making the evaluation, a court must indulge a *strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance;* that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered *sound trial strategy.*

Loop, 1996 SD 107, ¶ 14, 554 N.W.2d at 192 (emphasis added) (quoting *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-95). Moreover, "every effort [must] be made to eliminate the distorting effects of hindsight." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Phyle v. Leapley,* 491 N.W.2d 429, 433 (S.D.1992) (quoting *Kimmelman v. Morrison,* 477 U.S. 365, 381, 106 S.Ct. 2574, 2586, 91 L.Ed.2d 305, 323 (1986)), *overruled on other grounds by Hopfinger v. Leapley,* 511 N.W.2d 845, 847 (S.D.1994).

In regard to the second prong of the test, prejudice to the defendant, this Court must focus on whether the result of the proceeding was fundamentally unfair or unreliable, not merely on whether the outcome would have been different. *Siers,* 1998 SD 77, ¶ 12, 581 N.W.2d at 495; *Sprik,* 1997 SD 134, ¶ 22, 572 N.W.2d at 829; *Loop,* 1996 SD 107, ¶ 15, 554 N.W.2d at 192; *Hopfinger,* 511 N.W.2d at 847. The law does not entitle the defendant to have his conviction set aside "solely because the outcome would have been different but for the counsel's error." *Lockhart*

v. Fretwell, 506 U.S. 364, 369-70, 113 S.Ct. 838, 842-43, 122 L.Ed.2d 180, 189 (1993). Rather, "counsel's errors [must be] so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

With these principles in mind, we now examine Rhines' claims of ineffective assistance of counsel during his trial and original appeal. [1]

> A. Whether counsel were ineffective because they did not attempt to suppress Rhines' confession on grounds that it was induced by a false promise and thereby coerced and involuntary.

Rhines was arrested in King County, Washington, at approximately 12:45 p.m. on June 19, 1992, for a burglary that occurred in that state. After being read a *Miranda* warning, Rhines asked something to the effect of, "[t]hose two detectives from South Dakota are here, aren't they?" Rhines was asked no further questions by the King County authorities.

Detective Steve Allender of the Rapid City Police Department and Pennington County Deputy Sheriff Don Bahr arrived at 6:56 p.m. the same day to interrogate Rhines about the burglary and murder at Dig 'Em Donuts. Detective Allender testified that he advised Rhines of his *Miranda* rights before questioning began. During this questioning, Rhines confessed to burglarizing Dig 'Em Donuts and murdering Schaeffer. At some point in the interrogation Rhines also stated, "I don't deserve anything

[1] We have previously recognized that the same ineffective assistance rules apply to both trial counsel and appellate counsel. *Lykken v. Class,* 1997 SD 29, ¶ 27, 561 N.W.2d 302, 309.

but a kick in the teeth and the electric chair." In response, Detective Allender observed that South Dakota had not executed anyone in fifty years.

In Rhines' trial and original appeal, his appointed counsel unsuccessfully argued for suppression of Rhines' confession based on an inadequate *Miranda* warning and insufficient waiver of *Miranda* rights.[2] At the habeas corpus hearing, Michael Stonefield, one of Rhines' appointed counsel, testified that Rhines' confession was very damaging in both the guilt and penalty phases of the trial, and the attorneys never discussed ways to suppress the confession beyond the *Miranda* challenge. Stonefield also testified that he now believes the confession could have been challenged on grounds that Detective Allender made some type of implied promise to Rhines that he would not get the death penalty. Additionally, Wayne Gilbert, another of Rhines' appointed counsel, testified that he had some concern about Detective Allender's statements in that they may have suggested to Rhines that the chance of the death penalty was remote.[3]

On this habeas appeal, Rhines argues that his statement could have been attacked as involuntary, having been coerced by a false promise by Allender that Rhines would not receive the death penalty. He claims that had counsel made this argument at the suppression hearing, his confession could have been thrown out. *See State v.*

[2] *See Rhines,* 1996 SD 55, ¶¶ 5-37, 548 N.W.2d at 424-29.

[3] Gilbert, unlike Stonefield, testified that trial counsel did talk about suppressing the confession on these grounds, but Gilbert did not know how fully the discussion was developed into a legal argument.

Smith, 1998 SD 6, ¶ 7, 573 N.W.2d 515, 517 (involuntary confessions inherently unreliable).

However, in applying the two-prong analysis above, it becomes clear that counsels' failure to make this "coercion" argument was not ineffective assistance. First, there is no indication that counsel's representation fell below an objective standard of reasonableness as required by the first prong of the test. *Siers,* 1998 SD 77, ¶ 12, 581 N.W.2d at 495. The test for ineffective assistance is not whether counsel could dream up new trial strategies with the benefit of hindsight. It is whether counsel pursued a sound strategy at the time of the alleged error. *Sprik,* 1997 SD 134, ¶ 23, 572 N.W.2d at 829. At the time counsel were developing strategy for suppressing the statement, it was *entirely reasonable* for them not to pursue a coercion argument based on an alleged false promise by Allender.

The reasons for this conclusion are threefold. One, Allender's comment that South Dakota had not executed anyone in fifty years was a true statement and could not be construed as a *false promise* that Rhines would not get the death penalty. Two, there is nothing in the record from Rhines himself indicating that Allender's statement alone induced him to confess. In fact, the only real evidence of this supposed coercion is counsels' supposition at the habeas hearing.

Three, a number of factors indicate Rhines' confession was voluntary. Although Allender's statement might have induced Rhines to cooperate, "[t]he question is not whether the . . . statements were the cause of the confession but whether those statements were so manipulative or coercive that they deprived [the defendant] of his ability to make an unrestrained, autonomous decision to confess."

Smith, 1998 SD 6, ¶ 8, 573 N.W.2d at 517. Rhines made incriminating statements prior to Allender ever mentioning South Dakota's recent history with the death penalty.[4]

Additionally, in response to Allender's comment on the lack of recent executions, Rhines predicted, "There is a first time for everything." Moreover, as we recognized in Rhines' previous appeal, his statements throughout the interview reflected "an individual who [was] aware of the potentially grave legal consequences of his confession." *Rhines,* 1996 SD 55, ¶ 37, 548 N.W.2d at 429. Therefore, Rhines' contention that counsel should have pursued a coercion argument at the suppression hearing is not supported by the evidence, and he has failed to prove that counsel did not pursue a sound trial strategy under the first prong of the ineffective assistance test.

Second, in addition to not meeting the first prong of the ineffective assistance test discussed above, Rhines has not shown, under the second prong of the test, that he was prejudiced by the decision to attack the confession solely on *Miranda* grounds. *Siers,* 1998 SD 77, ¶ 12, 581 N.W.2d at 495. Rhines' brief and oral argument are replete with indications that his trial counsel would have pursued the coercion theory if they could do everything over again. What is utterly lacking, however, is any evidence that their decision to solely pursue a *Miranda* argument

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[4] Rhines had indicated that he was standing in the donut shop with money in his hand when he heard the door to the shop open, and at that point had nowhere to run. He had also asked, "You can't plead guilty to first-degree murder, can you?" to which Allender had responded, "I don't know."

prejudiced Rhines, that is, deprived him a fair trial.[5] As a result, Rhines has failed to satisfy either prong of the test for ineffective assistance of counsel in regard to his confession, and hence, we affirm the circuit court's decision on this issue.

> B. Whether counsel were ineffective because they did not appeal the trial court's refusal to answer the jury's questions on prison life under *Simmons v. South Carolina.*

After finding Rhines guilty of first-degree murder, the jury had to choose between the death penalty and life imprisonment without parole. During deliberations, the jury sent the court a note with specific questions about life imprisonment without parole, including:

> Will Mr. Rhines be allowed to mix with the general inmate population?
>
> Will Mr. Rhines be allowed to discuss, describe or brag about his crime to other inmates, especially new and/or young men jailed for lesser crimes? (ex: drugs, DWI, assault, etc.)
>
> Will Mr. Rhines be allowed to marry or have conjugal visits?
>
> Will Mr. Rhines be allowed to have or attain any of the common joys of life (ex. TV, radio, music, telephone, or hobbies and other activities to distract him from his punishment)?

[5] Indeed, Rhines' appellate counsel admitted in oral argument that no prejudice could be shown from trial counsels' decision to pursue only the *Miranda* argument.

> Will Mr. Rhines be jailed alone or will he have a cell mate?
>
> What sort of free time will Mr. Rhines have (what would his daily routine be)?

The court responded, "All the information I can give you is set forth in the jury instructions." The court denied defense counsels' request that the court add, "[Y]ou may not base your decision on speculation or guess work."

After the jury returned a sentence of death for first-degree murder, Rhines' trial counsel filed an appeal with this Court. In that appeal, counsel did not raise the trial judge's refusal to answer the jury's specific questions about prison life. Additionally, at oral argument, counsel did not cite *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994).[6]

In *Simmons,* the sentencing jury was given a choice between imposing the death penalty or "life in prison," and the trial court refused to instruct the jury that "life in prison" did not include the possibility of parole. Additionally, the prosecution argued that the defendant's future dangerousness could be considered by the jury in fixing a suitable punishment and that a death sentence would "be an act of self-defense." *Id.* at 157, 114 S.Ct. at 2191, 129 L.Ed.2d at 139. In addition, when the jury sent the court a note asking whether a life sentence carried a possibility of parole, the trial judge instructed them that they were not to consider parole eligibility and that life imprisonment

[6] Even though *Simmons* was not decided until after briefs were submitted in Rhines' original appeal, this Court's rules allow a party to present late authorities not available at the time of brief-writing, provided certain procedures are followed. SDCL 15-26A-73.

was to be understood in its "plain and ordinary" meaning. *Id.* at 160, 114 S.Ct. at 2192, 129 L.Ed.2d at 140.

On appeal, the Supreme Court overturned the conviction on due process grounds. The Court held that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Id.* at 156, 114 S.Ct. at 2190, 129 L.Ed.2d at 138.

Having put in place this background of the *Simmons* case and the jury's questions regarding prison life at Rhines' sentencing, we now turn to Rhines' ineffective assistance of counsel claim. Rhines argues the trial court should have specifically answered the jury's questions about the "reality of life without parole," and that its refusal to do so was a violation of due process under *Simmons.* Accordingly, he asserts that counsels' failure to make this argument at oral argument on his original appeal was ineffective assistance.

However, a closer analysis reveals that counsels' failure to cite *Simmons* at oral argument in the original appeal did not violate an objective standard of reasonableness or prejudice Rhines, as is required by the test for ineffective assistance. *Simmons* is clearly distinguishable from the case at hand.

The Court in *Simmons* made it clear that its decision was based on (1) the state putting the defendant's future dangerousness at issue, and (2) the failure of the trial court to tell the jury that "life in prison" meant life without parole. *Id.* at 161-62, 114 S.Ct. at 2193, 129 L.Ed.2d at 141. Neither of these factors were present at Rhines' sentencing.

First, the State never told the jury that future dangerousness was a factor for them to consider in sentencing. Rhines indicates that the prosecutor made such argument indirectly. For example, the prosecutor told the jury to consider such things as "the death of an innocent witness," and "the greedy killing of . . . [Schaeffer]" when evaluating aggravating circumstances. In addition, he suggested that Rhines knew how to kill with a knife, and that many people in the jury did not know how to kill with a knife. Finally, Rhines contends that the "depravity of the mind" circumstance itself[7] suggested that Rhines would be dangerous in the future.

However, the prosecutor's comments in this case do not rise to the level of argument in *Simmons,* in which the prosecutor expressly told the jury that imposing the death penalty would "be an act of self-defense." *Id.* at 157, 114 S.Ct. at 2191, 129 L.Ed.2d at 139. In addition, the facts of *Simmons* do not support the idea that the "depravity of the mind" circumstance, in and of itself, translates into a statement that Rhines' future dangerousness makes him deserving of the death penalty.

Second, even if future dangerousness was somehow made an issue, the jury in Rhines' case was repeatedly told that life imprisonment meant life without parole, which is exactly what is required by *Simmons.* That case did not require the trial court to speculate as to every possible situation which Rhines could encounter while spending

[7] This aggravating circumstance provides that "[t]he offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of the mind, or an aggravated battery to the victim." SDCL 23A-27A-1(6).

the rest of his life in jail.[8] Not only would this require a grotesque extension of *Simmons,* it would force a trial judge to speculate on day-to-day correctional decisions which are entirely within the discretion of the Department of Corrections. Indeed, had the trial judge attempted to answer the jury's questions in this case, he could have said little more than, "It depends," which would have generated even more unanswerable questions from the jury. It is impossible to believe that such a situation was envisioned by the Supreme Court in *Simmons.*

Because the State did not put future dangerousness at issue at Rhines' sentencing, and even if it did, the jury was clearly told that life imprisonment did not include a possibility of parole, *Simmons* is clearly distinguishable. As a result, Rhines cannot prove that his counsel violated an objective standard of reasonableness by failing to cite *Simmons* in his original appeal or that this tactical decision prejudiced Rhines with a fundamentally unfair result in that appeal. The circuit court was correct in rejecting this issue.

> C. Whether counsel were ineffective because they failed to ask for specific instructions that aggravating circumstances must be considered individually.

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[8] Rhines relies heavily on isolated language from Justice Souter's concurrence in *Simmons* for the proposition that the trial court should have answered specific questions on prison life: "[W]henever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning, and a death sentence following refusal of such a request should be vacated." *Id.* at 172-73, 114 S.Ct. at 2198, 129 L.Ed.2d at 148 (Souter J, concurring). However, an entire reading of the concurrence indicates that Justice Souter is addressing the sentencing term "life imprisonment," not suggesting that a trial court must specifically define "life without parole."

During the sentencing phase of the trial, the prosecutor began his argument by asking the jury to go to the death penalty verdict form when they began deliberations and to determine whether or not one of the aggravating circumstances had been proven to exist beyond a reasonable doubt. He then proceeded to discuss individual aggravating circumstances. In part of this discussion, he stated:

> Consider this aggravating circumstance, the death of an innocent witness. And when you consider that circumstance, and you consider it just in and of itself; because only one must be proven, based on that circumstance and that circumstance alone, I ask you to return a verdict imposing the sentence of death . . . But there is more . . . *there is not just one aggravating circumstance in this case, not just one upon which the law justifies the death sentence.* (emphasis added).

He later pointed out:

> And on that circumstance alone, that greedy killing of this young man, I would ask you to impose the death penalty . . . without even considering his relationship to the first one. But literally what I have talked to you about right now is why, why was Donnivan Schaeffer killed and sometimes in our daily lives we talk about the how and why, and I am going into the how now. *For there is another aggravating circumstance for you to consider, and that's the first one on the sheet.* (emphasis added).

Rhines claims that the prosecutor's argument violated South Dakota's capital sentencing scheme. In this state, the jury must find one aggravating circumstance beyond a reasonable doubt to impose the death penalty, but they are

always free to choose life imprisonment. SDCL 23A-27A-4 and 23A-27A-5. Because of the prosecutor's statements, argues Rhines, the jury chose death solely because of the sheer number of aggravating circumstances. He attaches special importance to this argument because the jury was not instructed on how to decide between life imprisonment and death once they found one aggravating circumstance existed beyond a reasonable doubt.[9] Rhines argues that counsel should have objected to the prosecutor's argument and proposed instructions that the number of aggravating circumstances had no impact on what sentence the jury should impose.

Once again, these arguments fail to meet the test for ineffective assistance of counsel. First, if indeed the jury was given no guidance on how to make a decision between life imprisonment and death after they found at least one aggravating circumstance,[10] this is clearly permissible under the precedents of this Court and the United States Supreme Court. *Rhines,* 1996 SD 55, ¶¶ 79-82, 548 N.W.2d at 437-38; *Tuilaepa v. California*, 512 U.S. 967, 978-79, 114 S.Ct. 2630, 2638-39, 129 L.Ed.2d 750, 764 (1994); *Zant v. Stephens,* 462 U.S. 862, 875, 103 S.Ct. 2733, 2741-42, 77 L.Ed.2d 235, 248-49 (1983). Therefore, this supposed lack of guidance lends no support to Rhines' ineffective assistance argument.

[9] South Dakota law permits the sentencer to consider all mitigating circumstances, but imposes no standard of proof on mitigation. SDCL 23A-27A-1 and 23A-27A-2.

[10] The jury was told that they could consider all mitigating factors and impose a life sentence even without a reason, which implies that they were given some guidance. However, because the law is clear on this point, we need not dwell on this issue.

Second, the prosecutor did not encourage the jury to give the number of aggravating circumstances special weight in arriving at a death sentence. The prosecutor began his argument by telling the jury that each individual aggravating circumstance was "so serious and so offensive by just one of those, the law tells you, you are justified in imposing the death penalty, just one." Moreover, it is clear that he argued each aggravating factor separately. The portions of his argument which mention more than one aggravating circumstance are clearly just matters of transition between the different aggravating circumstances. Indeed, the jury would have had difficulty following the argument if he had not used such segues.

Third, even if one could interpret the prosecutor's argument as inviting the jury to stack aggravating circumstances, the trial court's instructions adequately guided their deliberations. For example, the jury was instructed that they were not required to impose a death sentence, and they could impose a life sentence for any reason satisfactory to them, or for no reason. In addition, they were informed that *"[e]ach alleged aggravating circumstance,* and the evidence applicable thereto, should be considered separately ... *the existence of any one aggravating circumstance should not control or influence your decision with respect to another alleged aggravating circumstance."* (emphasis added). Finally, they were told, "If you find *one or more* aggravating circumstances to exist, then you may return one of two verdicts as to the penalty in this case," and they were given a choice between life imprisonment without parole or a death sentence. (emphasis added).

Therefore, even if the prosecutor's argument could be interpreted as encouraging the jury to give special weight

to the sheer number of aggravating factors, the court's instructions adequately guided their deliberations. The fact that the jury found more than one aggravating circumstance did not undermine their verdict.

Thus, there is no support for Rhines' argument that the jury imposed a death sentence because of the sheer number of aggravating circumstances. Likewise, he has failed to prove that counsels' failure to object to the prosecutor's argument during sentencing or propose specific instructions either violated an objective standard of reasonableness or prejudiced him with a trial that was fundamentally unfair. The circuit court was correct in denying his ineffective assistance claim on this issue.

Remaining ineffective assistance claims

Rhines raises several other issues relating to ineffective assistance of counsel in his brief. However, these remaining instances are either conclusions, which are wholly unsupported by the record, or sound trial strategy when judged by the circumstances facing trial counsel at the time of their decisions. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-95. Therefore, this Court will address the remaining ineffective assistance claims no further than to point out that Rhines has not proven either prong of the ineffective assistance test in regard to these claims. The circuit court's denial of these ineffective assistance issues is affirmed.

ISSUES TWO AND THREE

Whether this Court was required to conduct detailed harmless error analysis under the Eighth Amendment to the United States Constitution regarding the trial court's

instructional error defining depravity of the mind, and whether this error was not harmless if the jury found Rhines more worthy of the death penalty because of the number of aggravating circumstances based on the State's argument at the penalty phase.

In support of its death penalty verdict, the jury cited four separate aggravating circumstances in connection with Schaeffer's death. *Rhines,* 1996 SD 55, ¶ 166, 548 N.W.2d at 452. One of these four circumstances was that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of the mind. *Id.*

In Rhines' original appeal of his conviction and sentence, this Court ruled that the jury's discretion was not adequately channeled by the depravity of the mind aggravating circumstance, as limited by the trial court's instruction. *Id.* at ¶¶ 137-148, 548 N.W.2d at 447-49. As a result, we held that the depravity of the mind circumstance, as defined by the trial court, was overbroad and vague and hence constitutionally invalid under the Eighth and Fourteenth Amendments. *Id.* at ¶ 166, 548 N.W.2d at 452.

However, because the jury found four aggravating circumstances, only one of which was invalid, we analyzed what effect, if any, the invalid "depravity of the mind" circumstance had on Rhines' death sentence. Most of this analysis involved a thorough examination of *Zant,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235. In that case, the Supreme Court held that the invalidity of one aggravating circumstance did not require reversal of a death sentence if certain procedural safeguards were present in a state's capital punishment law. We determined that South Dakota's capital sentencing scheme, which is modeled after the Georgia death penalty statutes at issue in *Zant,*

included all the procedural safeguards emphasized in that case. *Rhines,* 1996 SD 55, ¶ 169, 548 N.W.2d at 453. As a result, we ultimately ruled that "the invalidity of the 'depravity of the mind' circumstance d[id] not so taint the penalty proceedings as to mandate reversal of Rhines' death sentence." *Id.*

With that background in mind, we turn to two interrelated issues raised by Rhines. First, he claims that this Court erred in not conducting a detailed harmless error analysis in his original appeal after we determined that the "depravity of the mind" circumstance, as limited by the trial court's instruction, was unconstitutional.[11] Second, he claims that the instructional error was not harmless because after the prosecutor's argument in the penalty phase of the trial, the jury imposed the death penalty based on the sheer number of aggravating circumstances. To state this argument another way, Rhines claims that if the jury imposed the death sentence solely because there were four aggravating circumstances, and one of the four aggravating circumstances was unconstitutional, then his sentence must be reversed.

We first address Rhines' argument that this Court was required to, and did not, undertake a specific harmless error analysis in his original appeal. He contends that this Court was required to give a detailed explanation of what the sentencing jury would have done absent the invalid "depravity of the mind" circumstance.

[11] This harmless error issue was seemingly raised in Rhines' original appeal. *Rhines,* 1996 SD 55, ¶ 167, 548 N.W.2d at 453. However, this Court did not directly address the issue in its previous opinion, so we will dispose of the issue here. *Id.* at ¶¶ 168-169, 548 N.W.2d at 453.

Rhines proceeds down two different avenues to arrive at this contention. First, he argues that South Dakota should be considered one of the "weighing" jurisdictions whose capital sentencing schemes require the sentencer to weigh aggravating and mitigating circumstances before arriving at a death sentence. In those weighing capital punishment jurisdictions, before it can uphold a death sentence imposed by a sentencer who considered an invalid aggravating circumstance, the appellate court must undertake either a re-weighing of aggravation and mitigation evidence, or a detailed explanation, based on the record, of why the invalid circumstance did not contribute to the sentence obtained. *Sochor v. Florida,* 504 U.S. 527, 532, 112 S.Ct. 2114, 2118, 119 L.Ed.2d 326, 336-37 (1992); *Clemons v. Mississippi,* 494 U.S. 738, 741, 110 S.Ct. 1441, 1444, 108 L.Ed.2d 725, 733 (1990).

However, this argument is without merit. This Court has clearly held that South Dakota law does not require the weighing of aggravating circumstances against mitigating factors. Although the jury is free to consider all mitigating circumstances, they need only find one statutory aggravating factor beyond a reasonable doubt to impose the death penalty. *Rhines,* 1996 SD 55, ¶¶ 78-82, 169, 548 N.W.2d at 437-38, 453. As pointed out above, our analysis in Rhines' original appeal satisfied the requirements of *Zant,* which is all that is required in a non-weighing capital punishment state such as South Dakota. *Id.* at ¶¶ 168-69, 548 N.W.2d at 453.

Second, Rhines opines that a detailed harmless error analysis is required even if South Dakota is a non-weighing state. In support of this proposition, he cites *Stringer v. Black,* 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992). In that opinion the Supreme Court stated:

With respect to the function of a state reviewing court in determining whether the sentence can be upheld despite the use of an improper aggravating factor, the difference between a weighing State and a nonweighing State is not one of 'semantics,' . . . but of critical importance. *In a nonweighing State,* so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty. Assuming a determination by the state appellate court that the invalid factor would not have made a difference to the jury's determination, there is no constitutional violation resulting from the introduction of the invalid factor in an earlier stage of the proceedings. *But when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.*

When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

503 U.S. at 231-32, 112 S.Ct. at 1137, 117 L.Ed.2d at 379 (emphasis added) (citation omitted).

Contrary to Rhines' interpretation, a review of the above-quoted language reveals that a detailed harmless error analysis is not required in a non-weighing state such as South Dakota. After a thorough analysis of South Dakota's capital sentencing scheme according to the factors in *Zant,* we concluded that the "invalidity of the 'depravity of the mind' circumstance d[id] not so taint the

penalty proceedings as to mandate reversal of Rhines' death sentence." *Rhines,* 1996 SD 55, ¶ 169, 548 N.W.2d at 453. After the detailed analysis of *Zant,* it was inherent in our conclusion that the "invalid factor would not have made a difference to the jury's determination." *Stringer,* 503 U.S. at 232, 112 S.Ct. at 1137, 117 L.Ed.2d at 379. Therefore, this Court committed no error in its analysis of the effect of the jury's consideration of the invalid "depravity of the mind" aggravating circumstance in Rhines' original appeal.

As for his next issue, Rhines argues that his conviction cannot survive harmless error analysis because the prosecutor at his trial suggested that the number of aggravating circumstance carried special weight in the jury's sentencing deliberations. As a result, Rhines contends, the invalidity of one of these aggravating circumstances requires reversal of Rhines' sentence.

Rhines' argument here has the same basis as his ineffective assistance of counsel claim discussed above under Issue 1(C). He claims that the prosecutor's argument to the jury in the sentencing phase of his trial urged them to stack aggravating circumstances to arrive at a death sentence. Essentially, Rhines contends that the prosecutor turned his jury into a "weighing" jury.

This Court has already rejected the merits of this argument under Issue 1(C). We find that the prosecutor's mention of multiple aggravating factors was merely a matter of transition in his argument, and even if this were not the case, the court's instructions sufficiently guided the jury's sentencing deliberations. As a result, even if this Court were required to undertake a harmless error analysis as

urged by Rhines, his argument on this issue would have no bearing on the Court's decision.

ISSUES FOUR THROUGH SIXTEEN

All remaining issues in Rhines' brief (Issues 4-16) were fully and fairly considered by this Court in his direct appeal. *Rhines,* 1996 SD 55, 548 N.W.2d 415. Therefore, we are bound by the "settled law in South Dakota that issues, which were raised in a direct appeal, are res judicata on a writ of habeas corpus." *Sprik,* 1997 SD 134, ¶ 20, 572 N.W.2d at 828. *See also Loop,* 1996 SD 107, ¶ 24, 554 N.W.2d at 193; *Lodermeier v. Class,* 1996 SD 134, ¶ 24, 555 N.W.2d 618, 626; *Scott v. Class,* 532 N.W.2d 399, 402 (S.D.1995); *St. Cloud v. Leapley,* 521 N.W.2d 118, 129 (S.D.1994). Consequently, these issues are barred by the doctrine of res judicata and will not be considered by this Court in this habeas review.

CONCLUSION

Rhines has failed to meet his burden of proof under our two-prong test for ineffective assistance of counsel. Additionally, this Court did not err by not undertaking a reweighing of aggravating and mitigating factors or a detailed harmless error analysis in Rhines' original appeal because such analysis is not required in a nonweighing jurisdiction such as South Dakota. We also reject Rhines' contention that under such analysis, his conviction must be reversed because the prosecutor's argument at the sentencing phase of his trial encouraged the jury to stack aggravating circumstances.

Affirmed.

MILLER, Chief Justice, and SABERS, AMUNDSON, and GILBERTSON, Justices, concur.

JAMES W. ANDERSON, Circuit Judge, for KONENKAMP, Justice, disqualified.